Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KENNETH ELLMAN,

Petitioner,

vs.

R.E. DAVIS, Warden, Westchester County Penitentiary,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the District Court's grant of a writ of habeas corpus and remanding for exhaustion of state remedies where the record showed, and the District Court found, that further resort to the state courts would have been futile and would have resulted in the irreparable harm of extending a period of unconstitutional incarceration of an innocent man?

2. Did the Court of Appeals err in reversing a grant of habeas corpus of an admittedly innocent man, when it determined **that state proceedings utilized to imprison provided no avenue for appeal, and that the burden of obtaining an appealable imprisonment order rested upon the prisoner and not the state?**

3. Did the Court of Appeals err in reversing the District Court grant of a writ of habeas corpus and remanding for exhaustion of state remedies, where the District Court found, and the record supported, that the state court prosecution was vindictive and in excess of jurisdiction?

4.Did the Court of Appeals depart from the accepted and usual course of judicial proceedings when it refused to take notice of or consider undisputed documentary evidence and District Court findings of fact, showing that Habeas Petitioner was refused appealable imprisonment orders even though the District Court **asked for further appellate review** thereof?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION STATEMENT	2
TABLE OF AUTHORITIES	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING	
ABSENCE OF APPEALABLE ORDERS REFUSAL TO CONSIDER DOCUMENTARY EVIDENCE OF THE DISTRICT COURT	8
ACTUAL INNOCENCE FUNDAMENTAL MISCARRIAGE OF JUSTICE	13

Petitioner Kenneth Ellman respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, entered on December 15, 1994.

Opinions Below

The Opinion of the United States Court of Appeals for the Second Circuit dated Dec. 15, 1994, is reported at 42 F.3d 144 (2nd Cir.1994), A1. The Memorandum and Order of the United States District Court for the Southern District of New York dated Oct. 12, 1993 is reported at 838 F. Supp 90. (S.D.N.Y 1993), A12. The Order of the United States Court of Appeals dated January 9, 1995 denying Motion to supplement record is found at A185. The Memorandum and Order of the United States District Court dated January 18, 1995 granting the motion to correct and supplement the record and asking for further appellate review, is found at A35,A199. The Order of the Court of Appeals of Jan. 6, 1995 and filed on Feb. 6, 1995, denying motion to "inform En Banc Court of new Record" is found at A39. The Order of the Court of Appeals of Jan. 6, 1995 and filed on Feb. 6, 1995, denying motion for a Petition for Rehearing is found at A37.

Jurisdiction Statement

A Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 was filed in the United States District Court for the Southern District of New York on April 5, 1993. Said Petition was granted on October 12, 1993. The Judgment of the United States Court of Appeals was Decided on December 15, 1994. The Petition for Rehearing with Suggestion for Rehearing En Banc was denied on January 6, 1995 and filed on February 6, 1995. This Petition for Certiorari is filed within ninety days of January 6, 1995 vesting jurisdiction in this Court pursuant to 28 U.S.C.§ 1254(1).

The Appendix attached hereto is cited as "A"

TABLE OF AUTHORITIES

Constitutional Provisions

Fourteenth Amendment, Fourth Amendment, Fifth Amendment, and Sixth Amendment, Eighth Amendment.

Statutory Provisions Involved

United States Code and Federal Rules
28 U.S.C. § 2254, § 2254 (b), §2254 (c).
18 U.S.C.§ 922, § 924. F.R.A.P. 10 (e).

New York State Statutes
N.Y. Penal Law §265.20 (f), §400.05 (6) §400 (12-c). N.Y. Criminal Procedure Law §2.10 (7-a). N.Y. Judiciary Law §774.

New Jersey Statutes
N.J.S.A.2C:58-3a, N.J.S.A. 2C:39-9d.

STATEMENT OF THE CASE

Petitioner filed a Writ of Habeas Corpus (A131) on April 5, 1993. On April 16, 1993 the District Court released Petitioner on Habeas bail after concluding that:"**the petitioner has demonstrated that the habeas petition raises substantial claims, and that extraordinary circumstances exist which make the grant of bail necessary to make the habeas remedy effective**"(A15).

On October 12, 1993 the District Court determined that the petitioner had exhausted state remedies, that the available remedies are ineffective and that any further resort to the state courts was futile (A12). The detailed and meticulous opinion of the District Court ruled in favor of the Petitioner on the merits of the Constitutional violations and granted the Writ. The District Court concluded that:

"**Indeed, the entire record reeks of extreme vindictiveness...**" (A29).

"**This relatively straightforward civil corporate dissolution proceeding seems to have taken on a life of its own**" (A15);

The legal and factual issues are well developed in the Courts below. There are no facts in dispute, A29.

The Court of Appeals heard oral argument on September 21, 1994. At this time Judge Minor questioned the Attorney-General:

"**I get somewhat a feeling of uneasiness on the merits of this matter. Why is it that you're persisting in this case when this appellee now has his guns in New Jersey where they're fully licensed and in his possession?** (A45)

Judge Minor further stated:**Well, what do you want him to do? Why do you want to keep him in jail for contempt until he does what? This is a civil contempt confinement, until he does what?** (A46)

On December 15, 1994 the Court of Appeals reversed the grant of Habeas Corpus solely on the grounds of failure to exhaust state remedies (A1). The Court of Appeals did not reverse the meritorious fact-findings in favor of Petitioner. The Court of Appeals however faulted the Petitioner for not having had an appealable order. It concluded that the exhaustion doctrine requires the **prisoner** to submit or obtain his own order of imprisonment, and faulted the petitioner for not doing so. Petitioner had perfected two direct appeals and three collateral appeals **before** seeking federal relief all to no avail. The "vindictive" prosecution was effected in part by imprisoning Petitioner with a series of nonappealable "purported orders" A28,A29. On March 2, 1993, the State Appellate Division issued a Decision and Order stating: **"ORDERED that on the court's own motion, the appeal from the purported order dated October 19, 1993 is dismissed, on the grounds that said purported order is merely a decision, which is not appealable"**. A23,A177.

It appears that an "order", even a "purported order" was sufficient to imprison, but not to appeal. After receiving this latest refusal to hear his appeal (in a long series of attempts) Ellman wrote from prison to the State Appellate Division that **"he no longer had the present ability"** to keep appealing each 90 day imprisonment order,A25. In a contested proceeding the Attorney-General objected but the Appellate Division By Decision and Order, granted the request, freeing Ellman from further repetitive state appeals,A195. The Courts below found that Ellman: (a)was repeatedly held in "coercive" civil contempt of court for not complying with a New York State Firearms Licensing Law relating to Peace Officers, A23, A26, A28,A166,A167,A171; (b) did not live in New York and was **no longer** a Peace Officer, A2, A3, A18, A31; (c)Ellman's firearms property was licensed in New Jersey where he lives,A3,A32,A45,A46,A71; (d)there is no judgment or proceeding alleging that his firearms property is owned by another,A31,48,49,67,69; and (e) was imprisoned without appealable orders,A23,28,122,177.

The fact-findings of this vindictive imprisonment, are well developed by the District Court and were not reversed by the Court of Appeals. Habeas petitioner Kenneth Ellman, a former resident of New York, permanently moved to his long time vacation home and farm in Sussex County, New Jersey in October of 1987 (A18, A131, A140, A80,A82). When Ellman moved to New Jersey with his entire family of three children he took all of his property, including his personally owned firearms property which was legally possessed in New York. At the time Ellman moved to his New Jersey home and farm there were no proceedings challenging his ownership or title to his firearms property, nor are there any today A31,A48,A67,. Petitioner has had since 1975, and still has, a firearms license from the Superintendent of State Police of the State of New Jersey to keep his firearms property in his New Jersey home (A71,A76,A77,A81,A82). It is settled that Petitioner has no firearms in New York, does not live in New York and has no property claimed by anyone else in New York A67,A69. To this very day, there was and is no replevin or property confiscation proceeding against the firearms property of Petitioner in any court. **While, the Attorney-General asserts they have the authority to bring a replevin action, they have never done so**,A31,A48,A49. Years after Petitioner was domiciled in New Jersey, the New York Attorney-General demanded that Petitioner obtain a New York firearms license for his firearms property. Absent such New York license, New York **demanded** that Ellman surrender his property under the voluntary surrender provisions of the New York Penal Law (which only applies to New York residents). Petitioner repeatedly informed the New York Court and the N.Y. Attorney-General that his firearms property was licensed in New Jersey where he lived. New York amazingly continued to insist that Ellman obtain a New York license or surrender his firearms to the New York State Police. The Attorney-General **insisted** that a new amendment to the N.Y. Criminal Procedure Law § 2.10 (7-a) required Peace Officers to **now** obtain a firearms license.

However,the New York Attorney-General and the New York court had actual and constructive knowledge that **Ellman lived in New Jersey, was no longer a New York Peace Officer and in fact had a New Jersey Firearms "license".** The **new** amendment to the N.Y. Criminal Procedure Law, relied upon by the Attorney-General did not go into effect until 1988, after Petitioner was an exclusive domiciliary of New Jersey.

Petitioner continued to live in his New Jersey home and farm and continued to possess his firearms property in New Jersey under New Jersey license. New York failed to commence any criminal proceedings for a violation of New York Firearms Laws. However to vindictively circumvent New York and New Jersey firearms laws Petitioner was found in "Contempt" of court for not having obtained a New York firearms license as **required by section 2.10 (7-a) of the C.P.L.** or absent a "license", surrendering his property to the New York State Police. Agents of New York came into Sussex County, New Jersey armed with a "court order" demanding that Petitioner give his New Jersey licensed firearms to New York Agents in violation of New Jersey law. New Jersey authorities refused to enforce the New York "order". Subsequently, Petitioner was found in "contempt of court" for not having a "license... as requried by Criminal Procedure Law 2.10 (7-a)". "Civil" arrest warrants not recognized in New Jersey were issued on February 8, 1991 and June 7, 1991. Petitioner was in New York on July 24, 1992 and arrested on these civil warrants. Ellman was then incarcerated in a criminal penitentiary for nine months, under the guise of purported civil contempt, with no act for Petitioner to do or any ability to purge, A48. There was no valid state court imprisonment order as the State Appellate Division was later forced to rule,A177.

As the District Court found:"**Indeed, the entire record reeks of extreme vindictiveness against a person who in all events has gone to New Jersey and taken his guns with him**",A29.

While the Court discussed the underlying corporate dissolution proceeding it reminded the reader:
"that the Court is not concerned with the propriety of the underlying dissolution proceeding (in which Mr. Ellman was named only in his capacity as a corporate officer)...; rather this Court is concerned only with the issue of whether Mr. Ellman's incarceration from July 27, 1992 through April 16, 1993, the date this Court released him on bail, for criminal contempt and continuing civil contempt violates his rights as guaranteed by the United States Constitution ",A26. This appeal is about this incarceration.

REASONS FOR GRANTING

Absence of Appealable Orders Refusal to Consider Documentary Evidence of the of the District Court

The Court of Appeals in reversing the District Court has created a new doctrine of law on exhaustion of state remedies and futility. The Court of Appeals calls it missed opportunities to obtain an imprisonment order. It determined that the absence of an appealable order, allows the state to enter a defense of failure to exhaust. Previously the prisoner carried the burden of properly perfecting his state appeals **after** he was imprisoned by judicial process. The prisoner would take his imprisonment order through the state appeal process seeking correction and justice. After the state had an opportunity to review and correct the imprisonment, Federal intervention could be sought.
The act of issuing an imprisonment order, was and is the triggering mechanism for starting the search for a state remedy. If the state imprisons a citizen, it must imprison him by judicial order. The state cannot use its brute force to imprison, without triggering the right to judicial review by

by judicial order.

To rule otherwise is to sanction a form of extra-judicial kidnapping, allowing incarceration without proper judicial process.The State should not be allowed to do that.

The issuance of the imprisonment order, being the act of the sovereign, is always a burden upon the state. The prisoner cannot issue his own imprisonment order. It has never before been asserted that the state can incarcerate without an imprisonment order.

The Court of Appeals has now imposed a **new** burden upon the citizen. It has determined that if the State incarcerates a citizen but, fails to issue an appealable order, that failure is a missed opportunity of the prisoner.
There is no question that Ellman was served with a "Notice of Entry" of the order of his imprisonment, A95. There is no question that Ellman timely appealed the order, A93. There is no question that Ellman fully and properly perfected his appeal and brief to the Appellate Division, Second Department,A86,A125. The Notice of Entry is dated October 26, 1992. On March 2, 1993, over four months later, the New York Appellate Division issued its decision and order, dismissing the appeal upon the grounds that it is an appeal from a "purported order" which is not appealable and leaving the Petitioner imprisoned.

The Court of Appeals decision allows the state to imprison upon non-appealable "purported orders" and at the same time the state can interpose the defense of exhaustion in federal habeas. How much more this deprivation of due process is, when the issuance of the "purported order" was deliberate state action over the vigorous objection of the

Petitioner,A99,A114..

Furthermore, the Attorney-General asserted to the Court of Appeals that the State sometimes **does accept** these "purported orders" for appeal. There is no procedural rule in New York that prohibits an Appellate Court from reviewing a "so-ordered" transcript. The decision to dismiss the appeal was not based upon any compelling state interest. The State cannot allow some of it's citizens to appeal and others not to. The Court of Appeals cannot blame this state action upon the Petitioner.

Standing alone the state action reflected above is a denial of the right to appeal and constitutes exhaustion. However the vindictive nature of the imprisonment is made clearer by the state action to deny the state writ of habeas corpus.
As the Court of Appeals and the District Court found Petitioner filed a state habeas on September 24, 1992. On September 28, 1992 the state dismissed the writ but refused to enter an order. The Court below determined that the State Writ of Habeas Corpus "fairly presented" all claims. But, without an order, Ellman could not appeal this denial of state habeas. The Court of Appeals blames Ellman for not obtaining an order dismissing his state habeas, saying again that the burden is upon the prisoner to obtain an appealable order. However, when documentary evidence was presented to the Court of Appeals that Ellman **twice** submitted proposed orders, the court below refused to take notice,A187.

On January 18, 1995, the District Court issued an Order to supplement the record with the documentary evidence that Federal Express had two signed receipts for proposed orders, A35,A197, A203, A214,A216, A220,A222. In that Order the District Court states:
"The omitted evidence pertains directly to the issues raised by the Court of Appeals in its decision, and controverts the repeated finding of that court ...".
In its decision the District Court said this evidence should be subject to further appellate review.

On February 6, 1995 the Court of Appeals denied Petitioners motion to "Inform the in banc court of new record" as made by the District Court, A39.
By refusing to consider documentary evidence of state action preventing Ellman from appealing, the Court of Appeals severely damaged the truth finding function of the court.

It is clear that state action precluded the Petitioner from appealing his incarceration.

The Court of Appeals states that counsel for a party is supposed to submit an order and cites to civil litigation practice as authority A8. But, the submission of orders in common civil litigation, without any liberty interest, does not support the conclusion that New York requires prisoners to make and submit their own order. Contempt imprisonment is not a normal civil process. On the contrary, New York requires a court to issue a detailed order **before** it can imprison for contempt (see N.Y. Judiciary Law). Due Process of Law should require such an order at a minimum.

While Ellman was imprisoned he brought two writs of prohibition pursuant to the specific holding of LaRocca v. Lane, 376 NYS2d 93 (1975) which authorized such proceedings to challenge contempt. At the time Ellman

brought these Writs he had no other appellate remedy since the state court refused to issue an order denying the state habeas. In those circumstances, where a Petitioner has no other remedy, because of state action in refusing to issue an order, they satisfied the exhaustion requirement. The state cannot deny an appealable order on the one hand and, refuse the only other remedy available. As the District Court found Petitioner tried every available route to challenge his illegal imprisonment.

The failure of the State to issue judicial process, is a waiver of the defense of exhaustion. It is an act of the State, not of the imprisoned citizen. The citizen has no duty or burden to obtain his own imprisonment order. Due Process of Law requires the State to issue judicial process to deprive a citizen of his liberty. When deprivation of liberty occurs without judicial process or appealable paper, and a citizen is left without state recourse, then the Federal Courts may act. A State may not assert the exhaustion doctrine as a defense months after it has denied a citizen judicial process and the right to appeal. In a case of imprisonment by a State without judicial process or appealable paper, for months on end, a citizen has the right of direct Federal Habeas.

In considering the denial of state appealable orders for months on end, it must be remembered that Ellman was arrested for an explicit ninety day imprisonment for civil contempt. He ended up spending nine months and would still be there if not for federal intervention. In light of the state action preventing appeal, Ellman was effectively denied any state review before the irreparable harm of imprisonment took place and before the sentence was exhausted.
The belated issuance of further orders of imprisonment does not cure the improper state action preventing appeal.

Furthermore, where the prisoner is held under the authority of a short-term civil contempt order, (as in this case) the

exhaustion requirement cannot mean that a state may unjustifiably deny a prisoner appeal rights for several months, ultimately allow the prisoner to exercise such rights months after he could have been released absent the delay -- then claim that his refusal to await the state's long-delayed "permission" to pursue state remedies is a "procedural default."

ACTUAL INNOCENCE
FUNDAMENTAL MISCARRIAGE OF JUSTICE

Petitioner was imprisoned for a Civil Contempt without any act for him to do or purge. This alone, establishes actual innocence. The Attorney-General argues in the Court below that they wish to **start** a replevin type proceeding to determine ownership of Ellmans property, A48. They admit that they now have no such judgment or proceeding. When questioned by Judge Minor the Attorney-General admitted that they have no present legal basis to imprison Ellman.

The only orders issued by the State Court directed Ellman to comply with section 2.10 (7-a) of the New York Criminal Procedure Law. As a New Jersey domiciliary, this statute required Ellman to do nothing and Petitioner was never in contempt of any court order.

Since the federal habeas doctrines of exhaustion and procedural default are comity based; they evince a respect for state court judgments, and an understanding that in a federal system, federal courts should not interfere when the states are taking care of their own business.

But, in a case such as this where the State of New York demands that a resident of New Jersey comply with New

York's firearms licensing laws exhaustion does not apply. It is proper and necessary for the Federal Courts restrain this overreaching of geographical jurisdiction. The New York Court clearly stated that it was attempting to enforce section 2.10 7-a of the New York Criminal Procedure Law. It even went so far as to send it's agents into New Jersey to attempt to enforce such New York law upon the Petitioner. This the Federal Courts should not allow, in this case or in any case. If New York believed that Petitioner/Appellee had property belonging to another it could bring suit in New Jersey Courts or New York Courts to assert such a claim. New York did not do so and New York has no judgment in any Court that Petitioner has property belonging to another. There is no State Court proceeding in New York or New Jersey where it is asserted that Petitioner has property belonging to another. There is not proceeding into which Petitioner can defend and seek justice.

As this Court and the District Court found and agree, Petitioner has his firearms property in New Jersey under New Jersey License.

In rem jurisdiction is in the State of New Jersey. Criminal jurisdiction for any alleged firearms law violations is in the State of New Jersey.

So it is clear that the plain reading of the "orders" of arrest of Petitioner, being that he failed to comply with section 2.10 7-a of the New York Criminal Procedure Law were the only allegations against Petitioner/Appellee. On that basis alone Petitioner is actually innocent.

The State of New York cannot use it civil contempt statute as a guise for enforcing its Criminal Laws in the State of New Jersey.

New York would not be entitled to a seizure warrant under the Fourth Amendment. It should not be permitted to seize the property and the body of Petitioner, in furtherance of this gross lack of geographical jurisdiction. The plain reading of

the orders of the state assert the authority of New York Criminal Procedure Law 2.10 7-a and Penal Law section 400 (12-c), which requires Petitioner as a New Jersey domiciliary to do nothing. Such gross lack of geographical jurisdiction eviscerates any claim to protection of comity.

It is not the business of the State of New York to seize the body and property of Petitioner/Appellant to enforce its Criminal Procedure Law and Penal Law in New Jersey. If New Jersey thinks I should not own my firearms property, then New Jersey can act upon me as one of its citizens. If New York thinks I own property belonging to another, then New York can bring suit to assert that. New York has no proceeding against me and New Jersey has granted me a longstanding license for my property. I should not be kept in a criminal penitentiary because of "**vindicative**" acts of a few State employees.

New York in attempting to enforce its firearms laws in New Jersey acted in the complete absence of subject matter jurisdiction. Lack of subject matter jurisdiction is grounds for a finding of actual innocence of the Petitioner.

For the reasons set forth in this petition, Kenneth Ellman respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this action.

Dated:April 6, 1995

Respectfully Submitted,
Kenneth Ellman

APPENDIX

BEST AVAILABLE COPY

TABLE OF CONTENTS

Order and Judgment of the Second Circuit, Dated December 15, 1994 ..... A-1

Memorandum and Order of the United States District Court for the Southern District of New York, Dated October 12, 1993 ..... A-12

Memorandum and Order of the United States District Court for the Southern District of New York, Dated January 18, 1995 ..... A-35

Order of the Second Circuit on Petition for Rehearing, Dated February 6, 1995 ..... A-37

Order of the Second Circuit on Motion "To Inform the En Banc Court Of New Record," Dated February 6, 1995 ..... A-39

Transcript of Proceedings Before the Second Circuit, Dated September 21, 1994 ..... A-41

Excerpts from Proceedings Before the Hon. Charles L. Brieant, United States District Court for the Southern District of New York, Dated April 16, 1993 ..... A-66

Excerpts from Proceedings Before the Hon. Aldo A. Nastasi, New York State Supreme Court, County of Westchester, Dated February 5, 1991. A-68

Letter from New Jersey State Police to Kenneth Ellman, Dated January 13, 1975 ..... A-71

New Jersey State Police Firearms Investigation Unit Subject Report A-72

Affidavit of Kenneth Ellman in Response to Order for Location of Six Firearms A-78

	Page
Affirmation of Harvey Kaminsky, Esq., in Support of Appellant	A-81
Stipulation to Re-Settle Order	A-83
Letter, Dated June 15, 1988 from Harvey A. Kaminsky to Hon. Aldo A. Nastasi	A-85
Excerpts from New York Supreme Court, Appellate Division - Second Department Record on Appeal	A-86
Statement Pursuant to CPLR 5531	A-91
Notice of Appeal	A-93
Notice of Entry	A-95
So Ordered Transcript	A-97
Excerpts from Transcript Before the Hon. Aldo A. Nastasi, Dated October 9, 1992	A-101
Exhibit A to Molic Affidavit - Commitment Papers	A-107
Exhibit B to Molic Affidavit - Computation of Sentence	A-112
Affidavit of Kenneth Ellman in Opposition to Order to Show Cause Returnable October 19, 1992 and for the Disqualification of the Hon. Aldo Nastasi	A-114
Excerpts from New York Supreme Court, Appellate Division - Second Department Appellant's Brief	A-125
Petitioner's Affidavit in Support of Application for Habeas Corpus	A-131

	Page
Exhibit A to Petitioner's Affidavit - Warrant of Arrest for Civil Contempt and Warrant of Arrest and Commitment for Criminal Contempt	A-166
Exhibit D to Petitioner's Affidavit - Orders of the New York State Court of Appeals, Dated December 23, 1991 and April 2, 1992	A-173
Exhibit H to Petitioner's Affidavit - Decision and Order on Motion, Dated March 2, 1993	A-177
Exhibit J to Petitioner's Affidavit - Judgment and Order of Dissolution, Dated July 29, 1991	A-179
Exhibit M to Petitioner's Affidavit - Order of the New York State Court of Appeals, Dated March 25, 1993	A-184
Notice of Motion/Order to Supplement the Record	A-185
Affirmation of Richard D. Emery in Support of Petitioner's Motion to Supplement the Record	A-189
Exhibit 1 to Emery Affidavit - Letter to the Hon. George Lange, III, from Kenneth Ellman, Dated October 28, 1994	A-193
Exhibit 3 to Emery Affidavit - Decision and Order on Motion, Dated May 23, 1993	A-195
Order to Show Cause for an Order Correcting, Modifying or Supplementing the Record	A-197
Affidavit of Kenneth Ellman in Support of Order to Show Cause	A-199

	Page
Exhibit 1 to Ellman Affidavit - Affidavit of Charles Fiore, Esq.	A-203
Exhibit A to Ellman Affidavit - Page 19 of Transcript of Proceedings, Supreme Court, Westchester County, Dated September 28, 1992	A-209
Exhibit B to Ellman Affidavit - Letter of Transmittal, Dated September 29, 1992; Proof of Delivery from Federal Express Corporation and Copy of Airbill	A-210
Exhibit C to Ellman Affidavit - Letter of Transmittal, Dated October 1, 1992; Proposed Order; Proof of Delivery from Federal Express Corporation and Copy of Airbill	A-216
Exhibit D to Ellman Affidavit - Order of the Hon. Aldo A. Nastasi, Dated January 13, 1993	A-224

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 53 -- August Term, 1994

(Argued: September 21, 1994 Decided: DEC 15, 1994)

Docket No. 93-2819

KENNETH ELLMAN,

Petitioner-Appellee,

v.

R. E. DAVIS, Warden Westchester County Penitentiary,

Respondent-Appellant.

Before: VAN GRAAFEILAND, MINER and McLAUGHLIN, *Circuit Judges*.

Appeal from a judgment entered on December 2, 1993 in the United States District Court for the Southern District of New York (Brieant, *J.*), on a cross-motion for summary judgment, granting petitioner-appellee's petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. The district court found that petitioner had exhausted his state court remedies and, in the alternative, if he had not exhausted, that he had demonstrated that the remedies available to him in the state courts were ineffective to protect his rights. The court also found for petitioner on the merits.

Reversed.

KENNETH ELLMAN
Newton, NJ
pro se.

PAMELA MANN, Assistant Attorney General, State of New York (G. Oliver Koppell, Attorney General of the State of New York, Sean Delany, Assistant Attorney General, Charities Bureau, of counsel) *for Respondent-Appellant*

MINER, *Circuit Judge*:

Respondent-appellant R. E. Davis, Warden of the Westchester County Penitentiary, appeals from a judgment entered on December 2, 1993 in the United States District Court for the Southern District of New York (Brieant, *J.*), on a cross-motion for summary judgment, granting petitioner-appellee Kenneth Ellman's petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. The court found that petitioner had exhausted his state court remedies and, in the alternative, if he had not exhausted, that he had demonstrated that the remedies available to him in the state courts were ineffective to protect his rights. The court also found for Ellman on the merits.

I.

The facts surrounding Ellman's incarceration involve a maze of state court proceedings that started in November of 1987, when the New York State Attorney General commenced an action to dissolve the Westchester County Society for the Prevention of Cruelty to Children, Inc. (the "Society"), a non-profit organization chartered under New York State law. Ellman was an officer of the Society and was named in the suit in his official capacity. As part of the dissolution proceeding, the New York State Supreme Court (the "trial court") ordered Ellman to surrender certain handguns that he had obtained in connection with his position as a peace officer in the Society. When Ellman's peace officer status was revoked in May of 1988, he was ordered to comply with the state's handgun

registration requirements, under N.Y. Penal Law § 400(12-c), within twenty days and submit proof of compliance to the court. On July 27, 1989, because Ellman still had not complied with the May 1988 order, the trial court ordered him to surrender all handguns for which he had not obtained a New York State license.

Eventually, Ellman obtained a license for his handguns in New Jersey, where he resided. In November of 1990, he moved the trial court for an order modifying that court's July 27, 1989 order insofar as it required him to surrender all handguns for which no New York State license had been obtained. The trial court denied this motion and held a contempt hearing, in which it ruled that Ellman was in civil contempt and sentenced him to ninety days in prison. The trial court, by order dated February 5, 1991, stated that if Ellman surrendered his handguns by February 8, 1991, it would vacate the contempt order and void his sentence. Ellman failed to surrender the handguns by the February 8th deadline, and the trial court issued an arrest warrant based on the civil contempt adjudication.

Although Ellman attempted to appeal the trial court's civil contempt adjudication to the Appellate Division, that court dismissed this appeal on the ground that Ellman was a "fugitive from justice and [was] unavailable to obey the mandate of the court." Ellman's leave to appeal to the New York Court of Appeals also was dismissed on the ground that "the order sought to be appealed from does not finally determine the action."

While the appeal was pending, the trial court had entered a final judgment dissolving the Society. However, the trial court retained jurisdiction over the action for the purpose of enforcing the judgment and order. The Attorney General also had moved for an adjudication of criminal contempt based on Ellman's willful disobedience of the trial court's July 31, 1989 and February 5, 1991 orders. The trial court granted the state's

motion and ordered that Ellman be sentenced to two thirty-day prison terms for each criminal contempt charge, and separate arrest warrants were issued. At that point, there were three warrants for Ellman's arrest pending in state court.

On July 24, 1992, Ellman was apprehended in New York pursuant to the three arrest warrants, and, on July 27, 1992, the trial court signed an Order of Commitment remanding Ellman to the custody of the Westchester County Department of Correction based on the prior civil contempt adjudication. Ellman commenced a state habeas action on September 24, 1992, in which he claimed that his detention pursuant to the contempt order was illegal and violated the Due Process Clause of the United States Constitution. On September 28, 1992, the state trial court denied Ellman's habeas petition.

On October 5, 1992, the Attorney General moved to have Ellman's period of detention for civil contempt extended for his continued refusal to surrender the handguns. At the hearing, Ellman still refused to surrender his guns. Accordingly, on October 19, 1992, the trial court granted the state's motion and sentenced Ellman to a second ninety-day prison term for civil contempt. However, rather than issue an order to this effect, the trial judge subscribed his name to the "so ordered" transcript and the transcript thus subscribed was entered in the County Clerk's office. Ellman's counsel objected, explaining that the "so ordered" transcript could not function as an appealable order. Counsel never attempted to submit an order to the trial court, despite his concern about the appealability of the judge's order.

Also in October of 1992, Ellman, acting *pro se*, commenced two Article 78 proceedings in the state Appellate Division in which he challenged the July 27, 1992 commitment order and the October 19, 1992 recommitment order and requested a writ of prohibition based on the same due process claims he had raised in his state habeas petition. The Appellate Division

denied both applications, ruling that Ellman had "failed to demonstrate a clear legal right to the relief requested which could not be otherwise safeguarded through alternative remedies." Ellman's leave to appeal to the New York Court of Appeals was denied. On November 18, 1992, Ellman, aided by counsel, again challenged the October 19th recommitment order, this time by way of a direct appeal.

On January 13, 1993, the state trial court signed an order dismissing Ellman's petition for a writ of habeas corpus, finally making it appealable. In that order, the trial court noted that it had advised Lewis & Fiore, attorneys for Ellman, to re-submit an order dismissing the petition, which the attorneys claimed they had submitted but the court had never received. Because Ellman's attorneys never re-submitted the order, the court had to prepare one on its own.

On January 14, 1993, the Attorney General moved to continue Ellman's confinement, and a recommitment order was signed. Also on that date, Ellman moved to stay enforcement of the October 19, 1992 recommitment order, the January 13, 1993 dismissal of his habeas petition, and the January 14, 1993 recommitment order, pending determination of his appeals therefrom. On March 12, 1993, the state Appellate Division denied Ellman's motion for a stay and dismissed, on its own motion, the appeal from the purported order dated October 19, 1992, stating that the October order was merely a decision, which is not appealable. The New York Court of Appeals declined to hear Ellman's appeal.

On February 2, 1993, Ellman filed an appeal challenging the January 13, 1993 dismissal of his habeas petition and the January 14, 1993 recommitment order, both then being properly signed orders of the state trial court and appealable as such. Finally, Ellman had perfected his state appeal. Nevertheless, after filing this federal habeas petition in the United States District Court for the Southern District of New York.

Ellman chose not to pursue his state appeal and requested the state Appellate Division to allow him to withdraw the appeal. On May 21, 1993, the state Appellate Division granted Ellman's request. In the meantime, the state trial court signed another recommitment order for Ellman's continued civil contempt.

Ellman's federal habeas petition alleged that his continued incarceration for civil contempt violated his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. On April 16, 1993, the district court granted Ellman bail. After hearing arguments on the exhaustion issue, the district court converted the state's motion to dismiss into a motion and cross-motion for summary judgment on the ground "that the procedural issue of exhaustion of remedies [was] inextricably intertwined with the merits" of the petition. On October 12, 1993, the district court granted Ellman's cross-motion for summary judgment and issued a writ of habeas corpus, having found that Ellman had exhausted his state court remedies and that, even if he had not, he would be excused from the exhaustion requirement based upon the circumstances of the proceedings in the state court. The district court also found for Ellman on the merits. This appeal followed.

II.

On appeal, the state argues that the district court erred in finding that Ellman had exhausted his state court remedies and in its alternative finding that the available state court remedies were ineffective to protect Ellman's rights. We agree with the state and, therefore, need not reach the merits of Ellman's habeas petition.

Under 28 U.S.C. § 2254(b), before a court can address the merits of any constitutional issue raised in a petition for a writ of habeas corpus, it must find that the petitioner has "exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the

existence of circumstances rendering such process ineffective to protect the rights of the [petitioner]." Where state law affords petitioner a right to raise his claim "by any available procedure," and the claim is not raised, it cannot be deemed to have been exhausted. *Id.* § 2254(c). "[I]t is not sufficient merely that the [petitioner] has been through the state courts." *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). Rather, the petitioner's claims must be fairly presented so that the state has the opportunity to correct any alleged constitutional violations. *Id.* at 276.

The federal habeas corpus exhaustion requirement is grounded in principles of federal-state comity. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (discussing adequate and independent state ground doctrine as it relates to the federal habeas exhaustion requirement). It provides the state courts with the first opportunity to correct potential constitutional violations before the federal courts intervene. *Id.* This principle is just as significant in civil contempt proceedings as it is in other contexts. *See United States ex rel. Goodman v. Kehl*, 456 F.2d 863, 869 (2d Cir. 1972) ("considerations of federal-state comity that militate against federal court intervention, by way of habeas corpus," apply with equal force in the context of civil contempt proceedings). Moreover, a petitioner who procedurally defaults on his state court remedies is barred from obtaining federal habeas relief, unless he can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

In this case, the district court found that Ellman had exhausted his state law remedies because of the "tortured history" of Ellman's efforts to have his claims heard in the state appellate court and the failure of the state trial court to issue an appealable order. The court, however, failed to consider that Ellman, after missing several opportunities to perfect a state

appeal, voluntarily withdrew his state appeal for no apparent reason. While the missed opportunities alone may have operated to bar Ellman's federal habeas petition, his voluntary withdrawal clearly deprived the state courts of the opportunity to hear his constitutional claims and thus barred federal relief. We will address the district court's findings at each phase of the state proceedings.

Following his incarceration, Ellman brought a state habeas action on September 24, 1992, in which he alleged that his incarceration for civil contempt violated his due process rights under the United States Constitution. This state habeas petition fairly presented Ellman's claims to the state trial court. The state trial court dismissed the writ on September 28, 1992; no order to this effect was signed, however, until January 13, 1993. Although Ellman attempts to lay the blame for the lack of an appealable order on the trial court, the record indicates that Ellman's attorneys could have prepared the order and submitted it for the court's signature. Further, sometime between October and January, the state trial court informed Ellman's attorneys that it had not received the order, but the attorneys still failed to submit one. Their failure to submit an order is contrary to the settled practice in New York. *See* N.Y. Uniform Civ. R. Sup. Ct. and County Ct. § 202.48 (providing that when the court requests a party to submit an order, such order must be submitted within sixty days). Therefore, Ellman could have presented his claim to the state Appellate Division in a timely fashion if his attorneys only had submitted an appealable order. Unfortunately, his attorneys neglected the opportunity, and the trial court had to draft and sign its own order on January 13, 1993.

In October of 1992, while waiting for someone to submit an appealable order for his habeas petition, Ellman, acting *pro se*, brought an article 78 proceeding before the state Appellate Division requesting a writ of prohibition. The district court

concluded that this writ of prohibition had fairly presented Ellman's constitutional claims to the state court. We disagree.

The writ of prohibition in New York state is an extraordinary remedy that is available only as a matter of judicial discretion and never as of right. *See La Rocca v. Lane*, 376 N.Y.S.2d 93, 97 (1975), *cert. denied*, 424 U.S. 968 (1976); *see generally* David D. Siegal, *New York Practice* § 559, at 876 (2d ed. 1991). In this case, the state Appellate Division denied the writ of prohibition, ruling that there were other remedies available to Ellman. The Appellate Division therefore never reached the merits of Ellman's claim, but rather denied the writ as a matter of discretion. The submission of claims to the state court on discretionary review does not automatically constitute the fair presentation of petitioner's claims. Only where the state court exercised its discretion and ruled on the merits will the exhaustion requirement be satisfied in this context. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). In ruling that other remedies were available to Ellman, the state Appellate Division was most likely referring to an appeal of Ellman's habeas petition. In any event, the Appellate Division never considered the merits of Ellman's constitutional claims, and, therefore, these claims were not exhausted within the meaning of 28 U.S.C. § 2254.

Next, Ellman attempted to appeal the October 19 "so ordered" transcript recommitting him for civil contempt. The record clearly indicates that counsel for Ellman knew that Ellman would need a signed order from the court to appeal the recommitment order. While the judge did not request Ellman's counsel to prepare an order at that time, nothing in the record indicates that Ellman's counsel was prohibited from presenting an order to the court for signature. Therefore, Ellman could have taken further action to have his constitutional claims fairly presented to the state Appellate Division and failed to do so.

All these errors aside, Ellman clearly failed to exhaust his state remedies by withdrawing his state appeal. In February of 1993, Ellman had finally perfected an appeal that would have fairly presented his constitutional claims to the state Appellate Division. For no apparent reason, aside from pursuing his federal habeas petition, Ellman voluntarily withdrew this appeal. The failure to pursue an appeal in the state courts results in a procedural bar to federal habeas relief unless the petitioner can show both cause for failing to bring the claim and actual prejudice from the failure to consider his federal claims. *Coleman*, 501 U.S. at 750. Here, Ellman had a perfected appeal pending in state court. His decision to withdraw that appeal simply does not constitute cause for failure to bring the claim, nor can he demonstrate prejudice from the failure to consider it. Ellman's voluntary withdrawal of his state appeal cannot satisfy the federal habeas exhaustion requirement.

The district court also found, in the alternative, that even if Ellman had not exhausted his state remedies, he was excused from the exhaustion requirement. The court found that in this case the remedy available in the state court was ineffective to protect Ellman's rights. We disagree.

An exception to the exhaustion requirement may be made "*only if* there is *no opportunity* to obtain redress in state court or if the [state] corrective process is *so clearly deficient* as to render *futile* any effort to obtain relief." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (emphasis added). The district court viewed the state procedure as ineffective to remedy the repetitive ninety-day recommitment orders. Of course, if Ellman properly had presented his constitutional issues to the state Appellate Division on either his original commitment order or any one of the subsequent recommitment orders, and the state court refused to hear his claims, the district court's view may have been correct. *See United States ex rel. Stevens v. McCloskey*, 345 F.2d 305, 308 (2d Cir. 1965) (ruling that petitioner, by appealing his first contempt conviction, had

satisfied the exhaustion requirement for his third conviction concerning the same issues presented to the state court), *rev'd on other grounds sub nom. Stevens v. Marks*, 383 U.S. 234 (1966). However, in this case, Ellman never properly presented his constitutional claims to the state appellate court. He never directly appealed the July, 1992 civil contempt adjudication, opting instead to pursue a state habeas petition. This state petition was dismissed in September, but the appeal could not be taken until January. The delays in Ellman's appeals were not the result of repetitive recommitment orders, but were caused, at least in part, by Ellman's attorneys' failure to submit orders to the court. The state remedies available were not ineffective and simple compliance with state procedure would have avoided much of the delay.

The district court also found that the "procedural obstacles" thrown in Ellman's way were not his fault, but were the fault of the state courts or the state Attorney General. A careful review of the record, however discloses that these "procedural obstacles" were not obstacles but were reasonable procedural requirements. Nothing in the record suggests that Ellman was precluded from submitting an order either for the dismissal of his state habeas claim or for the October recommitment order. Ellman's counsel knew that an order was required to pursue the appeal. Yet, Ellman and his counsel failed to take advantage of the available procedures. Ellman's own failure to utilize the state process cannot render that process "so clearly deficient as to render futile any effort to obtain relief," *Duckworth*, 454 U.S. at 3.

III.

For the foregoing reasons, the judgment of the district court is reversed, and this case is remanded to the district court with instructions to dismiss the petition for a writ of habeas corpus for failure to exhaust state court remedies, pursuant to 28 U.S.C. § 2254.

838 F. Supp. 90 (S.D.N.Y. 1993)

Kenneth ELLMAN, Petitioner,

v.

R.E. DAVIS, Warden Westchester County Penitentiary, Valhalla, New York, Respondent.

No. 93 Civ. 2164 (CLB).

United States District Court, S.D. New York.

Oct. 12, 1993.

Imprisoned former peace officer sought writ of habeas corpus in the New York federal district court. The District Court, Brieant, J., held that: (1) petitioner had exhausted his state remedies; (2) petitioner was excused from exhaustion requirement; and (3) petitioner's incarceration for criminal and continuing civil contempt based on his failure to turn over handguns violated his due process rights.

Writ granted.

1. Habeas Corpus 362.1, 364

Habeas corpus petitioner had fairly presented due process, double jeopardy and cruel and unusual punishment issues to state court, and thus had exhausted his state remedies before petitioning for writ of habeas corpus in federal district court, where he had presented claims to state court in proceedings for writs of prohibition and habeas corpus, and had unsuccessfully appealed from the denial of those writs. U.S.C.A. Const. Amends. 5, 8, 14.

2. Habeas Corpus 374.1

State remedies were ineffective to protect habeas corpus petitioner's rights, and thus he was excused from requirement that he exhaust all of his state remedies before petitioning for

writ of habeas corpus in federal district court, where state remedies were virtually inexhaustible, petitioner had attempted unsuccessfully to challenge his incarceration in state court, and it would have been futile to require any further exhaustion.

3. Habeas Corpus 320

Exhaustion of state remedies before petitioning for habeas corpus relief in federal district court is neither constitutional requirement, nor jurisdictional limitation on federal courts, but rather, is matter of comity between state and federal courts.

4. Constitutional Law 273

Weapons 16

Due process rights of former peace officer were violated by his incarceration for criminal contempt and continuing civil contempt based upon his failure to turn over to State of New York handguns which he had purchased in New York, but possessed at his New Jersey residence pursuant to facially valid permits issued by State of New Jersey; handguns were former peace officer's personal property, and he did not lose property rights in handguns when he lost his status as peace officer. U.S.C.A. Const.Amends. 5, 14.

Kenneth Ellman, Pro Se.

Gary Needleman, John Cross, Paralegal, Needleman & Schocket, Montville, NJ, for petitioner.

David G. Samuels, Sean Delaney, State of N.Y. Office of Atty. Gen. Robert Abrams, New York City, for respondent.

MEMORANDUM AND ORDER

BRIEANT, District Judge.

On April 5, 1993, the Petitioner Kenneth Ellman filed a Petition for a Writ of Habeas Corpus pursuant to Section 2254 of Tile 28 of the United States Code. 28 U.S.C. § 2254. At the time the Writ was filed, Mr. Ellman was being detained in this district, at the Westchester County Penitentiary in Valhalla, New York, for continuing civil contempt of the Orders of the Honorable Aldo A. Nastasi, Justice of the Supreme Court of the State of New York, County of Westchester, entered on July 31, 1989 and February 5, 1991, respectively, which were issued in connection with a civil corporate dissolution proceeding brought by the Attorney General of New York and entitled *"PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York v. WESTCHESTER COUNTY S.P.C.C., a Not-For-Profit Corporation, and KENNETH ELLMAN and JOHN and JANE DOE, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,* Index No. 22360/87". Mr. Ellman was not sued except in his capacity as a corporate officer.

On April 8,1993, Gary J. Needleman, Esq., appeared on behalf of the Petitioner before the Hon. Morris E. Lasker, the United States District Court Judge presiding in Part I, and presented the Court with a proposed Order to Show Cause to be issued pursuant to Section 2243 of Title 28, 28 U.S.C. § 2243, directing the respondent Warden to show cause why a writ of habeas corpus should not be granted releasing the Petitioner from custody on the grounds that he is being detained pursuant to a facially invalid order of civil contempt, that his rights under the due process clause of the United States Constitution have been violated and that his continued detention constitutes cruel and unusual punishment under the Eighth Amendment. *See* Doc. No. 4. The Order to Show Cause was issued and made returnable before me on April 16, 1993.[1]

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[1] Warden Davis accepted personal service of the Order to Show Cause on April 8, 1993. *See* Court Doc. No. 4.

On the return date, Hon. David G. Samuels, an Assistant Attorney General for the State of New York, appeared before this Court and agreed to defend the respondent county official because the allegations concern the actions of the Attorney General of the State of New York in the above referenced state court proceeding and the Court orders issued therein. *See* April 16, 1993 Transcript, at 2-3. On April 16, 1993, this Court granted the petitioner's application for bail after concluding that "the petitioner has demonstrated that the habeas petition raises substantial claims, and that extraordinary circumstances exist which make the grant of bail necessary to make the habeas corpus remedy effective." *See* April 16, 1993 Transcript, at 40 and discussion at 40-47. Petitioner was released on bail on the same date, having been in custody since July 24, 1992, a total of 266 days.

On May 28, 1993, this Court held a hearing to determine whether the petition should be dismissed for a failure to exhaust state court remedies and, after oral argument, the Court reserved decision. *See* 28 U.S.C. § 2254(b). On June 8, 1993, this Court issued an Order converting the motion to dismiss into a motion and cross-motion for summary judgment on the ground that the procedural issue of exhaustion is inextricably intertwined with the merits, or lack thereof, of the petition. The matter was marked fully submitted on July 1, 1993, the date of the last submission by counsel. There are no genuine disputed issues of material fact. The following constitutes this Court's decision on all issues.

This relatively straightforward civil corporate dissolution proceeding seems to have taken on a life of its own. Accordingly, this Court will recount the background of the case in some detail. Beginning in 1875 and until November 1, 1989, the New York State Legislature authorized the incorporation of voluntary Societies for the Prevention of

Cruelty to Children. *See* N.Y. Not-For-Profit Corp. Law § 1403(b) (McKinney 1970 & Supp.1993)[2]; N.Y. Times, February 7, 1989, § B, at 1. Members of these societies were given "peace officer" status under Section 2.10 of New York's Criminal Procedure Law, which empowered them to make summary arrests, file charges, take custody of children, and possess and carry handguns without a permit. N.Y.Crim.Proc.Law §§ 2.10, 2.20, 140.25 (McKinney 1992 & Supp. 1993). However, in November of 1987, the New York Legislature amended Section 2.10 of the Criminal Procedures Law by adding a subsection (7-a) which now requires peace officers to apply for a firearms license pursuant to Section 400.00 of New York's Penal Law. *See* N.Y.Crim.Proc.Law § 2.10(7-a); N.Y.Penal Law § 400.00 (12-c) (1989 & Supp. 1993).

On November 16, 1987, Robert Abrams, the Attorney General of the State of New York, commenced the proceeding previously mentioned in the Supreme Court of the State of New York, County of Westchester, under Sections 112(a)(1) and 1101 of New York's Not-For-Profit Corporation Law for judicial dissolution of the Westchester County Society for the Prevention of Cruelty to Children ("the Society"). *See* Court Doc. No. 19, at 3; Court Doc. No. 16, Ex. 6, ¶ 4. The Attorney General alleged, among other things, in the Verified Complaint that the Society and its principal officer, Kenneth Ellman, had abused their special powers under Section 1403(b) New York's Not-For-Profit Corporation Law by acting as a "private police department," and by willfully failing to register and file annual financial reports pursuant to Section 8-1.4 of the New York EPTL, and by specific ultra

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[2] Effective November 1, 1989, the New York State Legislature amended Section 1403 to prohibit incorporation of corporations for the prevention of cruelty to children. N.Y. Not-For-Profit Corp. Law § 1403(b) (McKinney 1970 & Supp.1993). Existing societies were grandfathered.

vires actions more particularly set forth in the complaint. Furthermore, no cases of child abuse or neglect had been brought by the Society in the Family Court for more than two years. The Attorney General also alleged that Mr. Ellman breached his duty as the principal officer of the Society to act in good faith and in a prudent manner, and had, instead, become a vigilante in the War on Drugs. *See* Court Doc. No. 12, Ex. 1, ¶ 1.

The Attorney General moved for preliminary and permanent injunctive relief against the Society, Mr. Ellman, and its officers, directors, agents and peace officers. By Order dated January 26, 1988, the New York Supreme Court preliminarily enjoined Mr. Ellman, the Society and its representatives from using any facility other than a municipal jail to detain persons, fingerprinting or photographing any person for any reason, and falsely representing to the public that the Society is an agency of the State, that it is a police agency, or that its agents are police officers. The order, as resettled in May 1988, apparently also ordered Mr. Ellman individually, in connection with six specified handguns purchased in 1984, to comply with the registration requirements of Penal Law § 400.00(12-c) within twenty days and submit proof of compliance to the court.[3]

On July 27, 1989, Justice Nastasi granted the Attorney General further injunctive relief and ordered the "defendants to report and turnover to a government law enforcement agency designated by the Court, all handguns that were acquired by defendants and registered with the New York State Police on the basis of Westchester SPCC peace officer authority and for which no license has been obtained as

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[3] We do not find the resettled order in the voluminous files submitted. *But see* "stipulation to re-settle order" filed as Exhibit "E" to Petitioner's Rule 3-g Statement in this proceeding.

required by Criminal Procedure Law Section 2.10(7-a)...." *See* Court Doc. No. 16, Ex. 11, at 3 (Order entered on July 31, 1989). Justice Nastasi also adjudged the defendants to be in contempt of Court pursuant to Section 5104 of the New York's Civil Practice Law & Rules based on defendants' continued misrepresentation to the public, that the Society is a government agency and its agents police officers. *Id.* The Court declined at that time to grant the Attorney General's motion for civil contempt against Mr. Ellman based upon his failure to register six handguns in accordance with Penal Law § 400.00(12-c). but stated that the Attorney General could renew this motion or "pursue a criminal prosecution against defendants under Penal Law Section 400.00(15)." *Id.* at 2.

On or about January 17, 1990, the State of New York, Division of Criminal Justice Services, removed Mr. Ellman's name from the peace officer registry. *See* Court Doc. No. 16, Ex. 14. In March of 1990, the Attorney General moved for an order, inter alia, holding Mr. Ellman and the Society in civil contempt based on their failure to comply with the Court's Order, which was entered on July 31, 1989, to turn over the handguns. In a decision dated September 5, 1990, Justice Nastasi ordered a hearing on the application for contempt and further enjoined Mr. Ellman and the Society from securing official license plates for motor vehicles and ordered them to surrender all such official plates in their possession.

In November of 1990, some three years after the commencement of state court litigation in New York, Mr. Ellman obtained a license for 17 handguns in New Jersey.[4] *See* Court Doc. No. 17, 1993, at 5; Court Doc. No. 19, ¶ 28, at p. 8. In November of 1990, Mr. Ellman also moved for an

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[4] The Attorney General represented affirmatively to Justice Nastasi that Mr. Ellman moved his residence to New Jersey in November, 1987, and there is no credible evidence to the contrary.

order modifying the July 31, 1989 Order insofar as it required him to turn over all handguns for which no New York license had been obtained pursuant to Section 400.00(12-c) of the Penal Law and to vacate the September 5, 1990 decision insofar as it set a hearing on the application for contempt. Justice Nastasi denied Mr. Ellman's motion on November 26, 1990.

The contempt hearing was commenced on January 3, 1991 and was concluded on February 1, 1991. At the close of the hearing, Justice Nastasi rendered his decision from the bench. Justice Nastasi adjudged Mr. Ellman to be in civil contempt and sentenced him to 90 days in the Westchester County Penitentiary.[5] *See* Record on Appeal from October 20, 1992 Order, at 89 (which is Exhibit K to Court Doc. No. 27, and hereinafter referred to as "Record"). The Court concluded, however, that Mr. Ellman could purge his contempt and avoid imprisonment if, by February 8, 1991, Mr. Ellman turned over to the New York State Police seventeen certain handguns which he admitted were in his possession at his residence in New Jersey and which the Court concluded had been acquired by him in New York based on his status as a peace officer. Record, at 89-90. Justice Nastasi directed the Attorney General to prepare an Order. Record, at 90-91.

On February 5, 1991, Justice Nastasi reaffirmed on the record, and in the presence of Mr. Ellman, his February 1, 1991 decision and signed a written Order implementing that decision. *See* Record, at 157-165. The tenth decretal paragraph of that Order states that "if defendant Ellman fails to comply with any of the provisions of this order as they apply to him, defendant Ellman is to be imprisoned in the Westchester County Jail for a period not exceeding 90 days or until discharged according to law." Record, at 164-65.

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[5] The contempt motion as to the Society was resolved by stipulation.

On February 7, 1991, Mr. Ellman applied to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, for a stay of the February 5, 1992 Order pending appeal, which was denied. He did not surrender the handguns to either the Attorney General's representative or to the New Jersey State Police, and Justice Nastasi issued a Warrant of Arrest for Civil Contempt on February 8, 1991. Record, at 166-169.

On March 21, 1991, the Attorney General moved by Order to Show Cause for an adjudication of criminal contempt based upon Mr. Ellman's "willful disobedience" of the Court's Orders of July 31, 1989 and February 5, 1991. *See* Record, at 170. By Decision and Order dated May 9, 1991, Justice Nastasi granted the application and imposed a sentence of 90 days on each of two criminal contempt adjudications, to run consecutive to each other and consecutive to the previously imposed 90 day civil contempt. *See* Court Doc. No. 6, Ex. B. On May 14, 1991, on the Court's own motion, Justice Nastasi modified these sentences "to reflect that the terms of imprisonment for defendant Ellman's criminal contempt shall be thirty (30) days." *See* Record, at 174, 182. On June 7, 1991, Justice Nastasi issued two Warrants for Arrest for the two separate adjudications of criminal contempt. *See* Record, at 252, 255.

On May 31, 1991, Judge Nastasi "permanently enjoined defendant [Ellman] from serving as an officer, director or agent of any Society for the Prevention of Cruelty to Children." *See* New York Law Journal, May 21, 1991, at 21. The Court also directed the parties to settle a judgment on notice which provided for the dissolution of the Society. While noting that the Attorney General's remaining requests for relief against Mr. Ellman must be denied as "academic" once the Society is dissolved, the New York Court stated that if "such relief [had] not been granted, the relief sought herein as to defendant Ellman would have been granted in all respects."

Id. On August 2, 1991, a Final Judgment dated July 29, 1991 dissolving the Society was entered in the Office of the County Clerk. Record, at 405-407. The Court purported to "retain jurisdiction of th[e] action for the purpose of the enforcement of th[e] Judgment and Order." *Id.* A timely Notice of Appeal was filed with the Appellate Division of the Supreme Court, Second Judicial Department, and that appeal is pending. The issues in that pending appeal, whatever they may be, do not extend to the propriety of Ellman's continued confinement, or his right to possess handguns in New Jersey.

On September 5, 1991, the Appellate Division, Second Judicial Department, dismissed Mr. Ellman's appeal from the February 5, 1991 civil contempt adjudication after finding that Mr. Ellman was "a fugitive from justice and is unavailable to obey the mandate of the court." *See* Court Doc. No. 12, Ex. 2. On December 23, 1991, Mr. Ellman's motion for leave to appeal to the New York Court of Appeals was dismissed on the ground that "the order sought to be appealed from does not finally determine the action" and Mr. Ellman's motion for reargument was denied on April 2, 1992. *See* Court Doc. No. 12, Ex. 3.

Mr. Ellman remained at his residence in New Jersey as a "fugitive" until his apprehension in New York on July 24, 1992 pursuant to the three separate arrest warrants. On July 27, 1992, Justice Nastasi signed an Order of Commitment remanding Mr. Ellman to the custody of the Westchester County Department of Correction based on his prior adjudications of civil and criminal contempt. *See* Record, at 76, 191-201. By this time the civil lawsuit had been concluded for almost a year, by the Final Judgment of July 29, 1991, which was silent on the subject of the handguns.

On September 24, 1992, counsel for Mr. Ellman presented the Clerk of the Supreme Court of Westchester County with an Order to Show Cause for a New York writ of habeas

corpus. This order was issued by Justice Nastasi and made returnable on September 28, 1992. Mr. Ellman argued that his continued detention pursuant to the contempt order was illegal and in violation of his rights under the due process clause of the United States Constitution. Specifically, he argued that (1) the New York State Court lacked authority to order a New Jersey domiciliary and resident to surrender firearms located at his residence in New Jersey; (2) the civil contempt ordered was a nullity, since all interlocutory proceedings and orders were merged in the July 29, 1991 Final Judgment of dissolution; (3) the criminal contempt adjudication was invalid for lack of service of the Attorney General's motion papers upon Mr. Ellman; (4) the second criminal contempt was a double jeopardy violation; (5) the civil contempt proceeding was punitive in nature; and (6) the confinement resulting from the three successive contempt proceedings constitutes cruel and unusual punishment. Record, at 241-49. Mr. Ellman also moved, by motion dated September 27, 1992, to disqualify Justice Nastasi. Record, at 49-57.

On the return date, September 28, 1992, Justice Nastasi denied the writ and the recusal motion from the bench. During oral argument, Mr. Ellman's then attorney, Charles Fiore, Esq. of Fiore & Lewis, advised the Court that Mr. Ellman had satisfied his civil contempt sentence based upon credit that was given to Mr. Ellman by the correction authorities pursuant to Section 804-a(l) New York Correction Law.[6] On October 5, 1992, the Attorney General moved by Order to

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[6] The Westchester County Department of Correction had determined that Mr. Ellman's sentence was 150 days [(90 days on civil contempt + 30 days on 1st criminal contempt + 30 days on 2nd criminal contempt)]. With credit for time served and "good conduct," the Department of Correction concluded that the minimum discharge date for Mr. Ellman was October 30, 1992 and the maximum discharge date was December 18, 1992. *See* Record, at 79.

Show Cause for civil contempt and to correct an alleged clerical error upon which Mr. Ellman's sentence was treated by the county correction authorities as a determinate sentence subject to good time credit, rather than an indeterminate sentence. Record, at 58-63. The Attorney General also moved to have Mr. Ellman recommitted for civil contempt based upon his continuing failure to comply with the Court's prior orders requiring him to turn over the 17 handguns.

On October 9, 1992, Justice Nastasi stated that Mr. Ellman's previously imposed sentence for civil contempt was "an indeterminate conditional sentence of civil contempt," and that Mr. Ellman "would be subject to continuing sentencing by this Court under a civil contempt were [he] not to comply with this Court's order and decision, and sentence." *See* Doc. No. 12, Ex. 6, at 24, 25. The Court declined to issue any order on the ground that the Court was merely "clarifying what it previously said for the benefit of all concerned." Record, at 377-378. When the hearing resumed on October 19, 1992, the Court "so ordered the transcript" over the objection of counsel for Mr. Ellman, and that "order" was entered in the County Clerk's Office on October 20, 1992. *See* Record, at 5, 46-47.

On November 18, 1992, Petitioner's attorney, David Lewis, Esq. of Fiore & Lewis, filed an appeal with the Appellate Division, Second Judicial Department, challenging the Court's October 20, 1992 "Order". *See* Record, at 3. As was to be anticipated, on March 2, 1993, the Supreme Court of New York, Appellate Division, Second Judicial Department dismissed the appeal because the so ordered transcript was not an appealable order. *See* Court Doc. No. 15, at 8. This elementary procedural trap must have been apparent to all the participants at the time.[7] As we noted earlier, the state court

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[7] Perhaps a busy court would not recognize immediately that a "so ordered" transcript is not an appealable order, but certainly the chief legal officer of the state, and his assistants, would know better.

proceedings seem to have taken on a life of their own. Indeed, Petitioner quotes the court as having, on January 3, 1992, threatened to have the United States Marshal arrested should Ellman invoke the aid of this Court.[8]

In October of 1992, Mr. Ellman commenced two *pro se* Article 78 proceedings in the Appellate Division, Second Judicial Department, allegedly because the Supreme Court would not issue an appealable order.[9] *See* Court Doc. No. 15, at 22. In one application, he raised the issues he had presented in the state habeas corpus petition but sought a writ of prohibition rather than habeas corpus relief. In the second application, he challenged the October 9, 1992 clarification of his sentence and the recommitment. The Appellate Division denied both applications on the ground that Mr. Ellman "failed to demonstrate a clear legal right to the relief requested [Writ of Prohibition] which could not otherwise be safeguarded through alternative remedies." *See* Court Doc. No. 12, Ex. 10. Mr. Ellman's *pro se* application for leave to appeal to the Court of Appeals was denied on March 25, 1993. *See* Court Doc. No. 12, Ex. 11.

On January 13, 1993, the state court, on its own motion, signed an order and judgment dismissing Mr. Ellman's petition for a writ of habeas corpus. *See* Court Doc. No. 27, Ex. F. On January 14, 1993, a hearing was held on the Attorney General's motion to continue petitioner in confinement and a recommitment order was signed on that date.

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[8] Affidavit of Kenneth Ellman sworn to September 28, 1992, in the state proceedings. This Court notes that no official transcript of this statement was submitted.

[9] Ellman has been represented by various lawyers at various times, and intermittently has acted *pro se*. While he has a right to change counsel or act without counsel from time to time, some procedural discontinuity is unavoidable as a result.

See Court Doc. No. 12, Ex. 13. In February of 1993, Mr. Ellman filed a motion to stay enforcement of (1) the October 19, 1993 Order "clarification" of his civil contempt sentence; (2) the January 13, 1993 denial of the writ; and (3) the January 14, 1993 Recommitment Order. By Decision & Order dated March 2, 1992, as amended on March 12, 1993, the Appellate Division denied Mr. Ellman's motion for a stay and dismissed, on its own motion, "the appeal from the purported order dated October 19, 1993 ... on the ground that said order is merely a decision, which is not appealable." *See* Court Doc. No. 14, Ex. 15. On March 25, 1993, Mr. Ellman's application for leave to appeal to the Court of Appeals was denied. *See* Court Doc. No. 27, Ex. M.

On February 2, 1993, Mr. Ellman also filed two Notices of Appeal with Appellate Division, Second Judicial Department, in which he challenged the January 13, 1993 denial of the writ and the January 14, 1993 Recommitment Order. *See* Court Doc. No. 12, Exs. 5, 14. Mr. Ellman concedes that he "ha[d] not perfected either appeal" prior to filing the instant petition for a Writ of Habeas Corpus before this Court. *See* Court Doc. No. 15, at 9. On April 10, 1993, five days after the petition for a writ was filed in this Court, Mr. Ellman wrote a letter to the Appellate Division, Second Judicial Department, in which he sought to withdraw his pending appeals from the January 13, 1993 denial of the writ and the January 14, 1993 Recommitment Order, and requested that his pending appeal be dismissed.[10] *See* Court Doc. No. 16, Ex. I. On May 21, 1993, the Appellate Division granted Mr. Ellman's request, despite the objections of the Attorney General's Office, and

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[10] Mr. Ellman offered the following explanation for the application to the Appellate Division: "I am a prisoner with limited resources and time available. I do not have the present ability to keep appealing each ninety day order, nor do I believe it is necessary...." *See* Court Doc. No. 16, Ex. I.

dismissed both of these appeals. *See* May 28, 1993 Transcript, at 19. In so doing, the Appellate Division, by closing the door, in effect provided any finality which might have been lacking.

In the meantime, on March 31, 1993, Judge Nastasi signed yet another Recommitment Order for Mr. Ellman's continuing civil contempt. *See* Court Doc. No. 6, Ex. C. This Order provides that: "defendant Kenneth Ellman is recommitted conditionally to the custody of the Warden of the Westchester County Penitentiary, Penitentiary Division, for an additional term of incarceration not to exceed 90 days...." *Id.* at 5.

Although this Court's discussion below, of necessity, makes some reference to the July 29, 1991 Final Judgment of dissolution of the Society, the Court reminds the reader that this Court is *not* concerned with the propriety of the underlying dissolution proceeding (in which Mr. Ellman was named only in his capacity as a corporate officer), nor with any appeals taken therefrom; rather this Court is concerned only with the issue of whether Mr. Ellman's incarceration from July 27, 1992 through April 16, 1993, the date this Court released him on bail, for criminal contempt and continuing civil contempt violates his rights as guaranteed by the United States Constitution.

I. *Exhaustion Issue*

Before this Court will address the merits of any constitutional issue raised on a writ of habeas corpus, "it must appear that the [petitioner] has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the [petitioner]." 28 U.S.C. § 2254(b); *see also* 28 U.S.C. § 2254(c); *Gonzalez v. Sullivan,* 934 F.2d 419 (2d Cir. 1991).

The Petitioner has presented his federal constitutional claim, the same claim that is presented before this Court, to the State Court in a collateral proceeding for a Writ of Prohibition and had sought to appeal from the denial of the same. The Petitioner also directly appealed from Justice Nastasi's September 28 denial of the Writ of Habeas Corpus and that appeal was dismissed due to the state court's failure or refusal to issue an order in appealable form.

[1] By this, and by the tortured history of his efforts to regain his liberty since he was confined, Petitioner has satisfied the exhaustion requirement, insofar as he has "fairly presented" to the state court all the issues now before this Court. *See Piccard v. Connor,* 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971) ("[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.") *Gonzalez v. Sullivan,* 934 F.2d 419, 423 (2d Cir.1991) (Court of Appeals affirmed district court's conclusion that petitioner fairly presented his federal claim to the state court where "[p]etitioner's citation to the Fourteenth Amendment in a heading in his brief sufficiently alerted the state courts to the federal constitutional nature of the ... claim."). This Court therefore concludes that Mr. Ellman has exhausted his state remedies.

[2] Even if this Court were to conclude that the petitioner had failed to exhaust his state remedies, which it has not, the Petitioner is properly excused from the exhaustion requirement. Exhaustion is unnecessary where, as here, there is either an absence of available state corrective process or the existence of circumstances, such as futility or inordinate delay, which render the process ineffective. 28 U.S.C. § 2254; *Duckworth v. Serrano,* 454 U.S. 1, 3-4, 102 S.Ct. 18, 19, 70 L.Ed.2d 1 (1981) ("An exception is made [to the exhaustion requirement] only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief....").

This Court concludes that the petitioner in this case has demonstrated that the remedy available to him in the state court is ineffective to protect his rights. The State Court remedies available to the petitioner in this case are virtually inexhaustible. This is because every ninety days a new Recommitment Order issues. *People ex rel. Reamy v. Director Central Islip State Hosp.*, 35 A.D.2d 595, 313 N.Y.S.2d 434 (2d Dept 1970); *Castille v. Peoples*, 489 U.S. 346, 350, 109 S.Ct. 1056, 1059, 103 L.Ed.2d 380 (1989) ("It would be inconsistent with [Section 2254(b)], as with underlying principles of comity, . . . permanently to bar from federal habeas prisoners in States whose post-conviction procedures are technically inexhaustible."). There would be no point in sending Mr. Ellman back to the state court to make repetitive and futile efforts to satisfy the exhaustion requirement.

Moreover, the State cannot complain of lack of exhaustion when the State itself was responsible for this failure. *See, e.g., Harris v. Kuhlman*, 601 F.Supp. 987 (E.D.N.Y.1985). In this case, without objection from the Attorney General, Justice Nastasi declined to enter an order in appealable form, and instead "so ordered" the transcript of the proceeding in which he decided that Petitioner's 90 day civil contempt sentence was "an indeterminate conditional sentence" and that the Petitioner "would be subject to continuing sentencing...." *See* Record, at 46-47; 377-378; Court Doc. No. 12, Ex. 6, at 24-25. The Appellate Division, some *four* months later, to the surprise of no one except possibly the *pro se* Petitioner, held that this type of "order" is not appealable.

Despite this procedural obstacle thrown in his way, which was not the fault of the Petitioner, the Petitioner attempted to challenge this decision by direct appeal and also by filing a Writ of Prohibition. Both of these avenues of attack were unsuccessful. With respect to the writ of habeas filed in the State Court, Judge Nastasi either failed to or refused to enter

an appealable order until January 13, 1993, some four months after that petition had been denied, during which time the Petitioner remained incarcerated. Again, the Petitioner tried, albeit unsuccessfully, to challenge this decision, without an appealable order, by seeking a Writ of Prohibition and also by direct appeal. Thus, the State effectively impeded petitioner's ability to exhaust his state remedies.

We do not fault the Supreme Court Justice for this momentary lapse; we understand that the Supreme Court in Westchester County handles many more cases per judicial officer than any federal court in the nation, and does so with far less supporting personnel. However, the Attorney General of the State of New York, as chief legal officer, had actual and constructive knowledge from the inception that the order was not appealable. A government lawyer dealing with the liberty of a citizen owes such a litigant and the Court something more than merely remaining silent for four months while an incarcerated person acting *pro se*, thereafter attempted to appeal a visibly non-appealable order. Indeed, the entire record reeks of extreme vindictiveness against a person who, in all events, has gone to New Jersey—and taken his guns with him. Surely, there are better things to do.

The Attorney General's Office does not dispute these facts. Instead, the Attorney General's Office argues that Petitioner should have exhausted his state remedies, by perfecting, rather than withdrawing the appeals he filed on February 2, 1993, after the state court decided to issue orders in appealable form.

This Court disagrees. At the time this petition was filed in federal Court, the petitioner had already spent 9 months in jail on a civil contempt adjudication. There is no telling how long he would have remained incarcerated if he were required to reargue issues previously presented to the New York appellate courts.

It would be futile to require any further exhaustion in this case. The petitioner has attempted repeatedly to challenge his incarceration, by way of appeals, and a state Writ of Prohibition and a state Writ of Habeas Corpus. As Judge Friendly observed, exhaustion of remedies does not mean exhaustion of the petitioner. *United States ex rel. Kling v. LaVallee,* 306 F.2d 199, 203 (2d Cir.1962) ("I would not wish to be committed to a rule that when a state prisoner has exhausted all remedies the state had made available to him up to the date when he sought Federal habeas corpus, he must always be sent back on another journey through the state courts if the state, commendably, enlarges its post-conviction remedies thereafter .... [A]lways to require a second, not to speak of a third or a fourth [exhaustion] might well invite the reproach that it is the prisoner rather than the state remedy that is being exhausted.")

[3] Exhaustion of remedies is neither a constitutional requirement, nor a jurisdictional limitation on the federal courts. *See e.g., Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Granberry v. Greer,* 481 U.S. 129, 131, 107 S.Ct. 1671, 1673, 95 L.Ed.2d 119 (1987) ("failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application"). Instead, this procedural requirement to exhaust state remedies is a matter of comity between the federal and state courts. Forbearance is based upon the assumption that the state remedies available to petitioners are adequate and effective to vindicate federal constitutional rights. When, as in this case, those state procedures become ineffective or inadequate, or are deliberately frustrated by state actions, the foundation of the exhaustion requirement is undercut and the federal courts may act.

II. *Merits of Claim*

[4] Based on the facts set forth above, and the following additional facts which are uncontested, this Court concludes

that there was no justification under the Constitution, either procedurally or substantively, for the incarceration of Mr. Ellman.

All evidence in the state court record shows that it was appropriate that the Westchester County Society for the Prevention of Cruelty to Children be dissolved, be required to turn over its own property to the state, and refrain from attempting to exercise any of its corporate or statutory powers. This was accomplished by final judgment of the Supreme Court of Westchester County entered July 29, 1991. Ellman was a party to that litigation only in his representative capacity as an officer and director of the Society. Except for the appeal, this civil dissolution proceeding was then concluded. The Attorney General could have moved to dismiss that appeal for neglect of the Society to perfect it, but he did not.

Both parties agree that Ellman has not been a resident of New York State since approximately November, 1987. Indeed, this fact was relied on affirmatively by the Attorney General in the dissolution proceedings to support the legal conclusion that being a non-resident of the state, Ellman was unauthorized to act as a peace officer for the Westchester Society.

At no point in the state court record is it claimed that the handguns, however many there may be, are the property of the dissolved Society. The contention presented by the Attorney General seems to be that although Ellman purchased the handguns with his own personal funds, whereby they became his own personal property, he was enabled to purchase them without a handgun permit solely because of his *status* as a peace officer. The conclusion of the Attorney General, a total non-sequitur, is that upon losing his status as a peace officer he lost his property right in the handguns and had to surrender the handguns (then legally held by him in New Jersey) to the New York State Police. There is no

jurisprudential basis for this remarkable conclusion, and indeed, the state court did not even attempt to state such a finding or conclusion, or support it with any statutory reference, or by caselaw, when it was first advised by the Attorney General.

It is uncontroverted that at all times, at least since the dissolution of the Society, and at the present time, Mr. Ellman possesses the guns, or some of them, at his residence in New Jersey. This possession is represented to be pursuant to a facially valid permit issued by the State of New Jersey, and the Attorney General of New York presents no evidence to the contrary. See Court Doc. 17 at p. 5 and 19, p. 8. The Attorney General of New York has argued before me that this permit was obtained by misrepresentation, and indeed, his office has so informed the New Jersey authorities. This is hardly a basis for the coercive civil contempt power to be exercised in New York. Under our federalism, it is of no legitimate concern to the Supreme Court of Westchester County, New York that a New Jersey resident may be owning and possessing handguns in New Jersey, whether or not under a facially valid permit issued by the State of New Jersey. The New Jersey state government has adequate means at its disposal to enforce peace and tranquility within its own borders, without any need to rely on the efforts of a New York court or the New York Attorney General. It is not the province of the New York Attorney General's Office, or for that matter the Supreme Court of the State of New York, to enforce or interpret the laws of the State of New Jersey pertaining to firearms, whatever they may be.

There is no need for a civil contempt order to protect the public interest in New York State, which is the only legitimate interest of the Attorney General, because should Ellman ever come, armed, within the borders of the State of New York he would immediately be subject to criminal

prosecution for the possession of a handgun in the absence of a New York permit.

His continued incarceration to compel compliance with interlocutory orders entered in a New York civil proceeding, which has long since been dissolved, for the dissolution of a corporation, which has long since been concluded, has no possible claim to procedural or substantive due process.

Since it is not disputed that these handguns are Ellman's personal property, there is no way for the state to get them away from him without compensation, in light of the Fourteenth Amendment of the United States Constitution. Guns may not be politically correct property, but they remain property.

Furthermore, these ostensibly civil commitments, at least by now, have developed into a criminal contempt. The confinement is no longer coercive, but punitive in nature, and invokes the right to greater procedural due process, including trial by jury.

There being no further purpose in New York of coercing plaintiff to do anything as of the present time, and petitioner having more than adequately paid his debt to society for whatever criminal contempt he showed to the Supreme Court, it is abundantly clear that the writ should issue.

For the foregoing reasons, this Court grants Mr. Ellman's writ and joins all persons having actual notice from conducting any further prosecutions of civil or criminal contempt of court against Mr. Ellman for any facts pertaining to his firearms existing as of the date of the final judgment to be entered herein. Lest this rather intransigent litigant should misunderstand the force and extent of this court's order, Mr. Ellman must understand that if he were to re-establish his residence in New York State, or simply transport, carry, or possess these or any other handguns within New York State

without a lawful New York permit, he will be subject to well deserved criminal prosecution in the New York courts for any such violation.

Settle a final judgment on notice.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENNETH ELLMAN
as Applicant for Writ of Habeas Corpus
pursuant to 28 U.S.C. 2254

– against –

Warden R.E. Davis
Westchester County Penitentiary
and any other person having custody
of Kenneth Ellman

Memorandum & Order

93 Civ. 2164 (CLB)

U.S. DISTRICT COURT
FILED W.P.
JAN 18 1995
S. D. OF N. Y.

Brieant, J.

The petitioner Kenneth Ellman, by order to show cause returned on January 18, 1995 at 12:30 p.m., seeks an Order Correcting, Modifying or Supplementing the Record on Appeal pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure for the United States Court of Appeals. This application is hereby granted in the interests of justice.

The Court of Appeals for the Second Circuit by decision dated December 15, 1994, reversed this Court's Memorandum and Order dated October 12, 1993 which had granted the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and remanded the case to this Court with instructions to dismiss the petition on the grounds of failure to exhaust state court remedies. Petitioner Ellman herein requests that the Record be corrected or supplemented to include documentary evidence that his former attorney, Charles Fiore, twice transmitted proposed orders by Federal Express in an effort to appeal his denial of the State Writ of Habeas Corpus.

Rule 10(e) of the Rules of Appellate Procedure provides that:

> ". . . If anything *material to either party* is omitted from the record by error or accident or is misstated therein, . . . the district court either before or after the record is transmitted to the court of appeals . . . may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted." (Emphasis added.)

The omitted evidence pertains directly to the issues raised by the Court of Appeals in its decision, and controverts the repeated finding of that court that: "While the judge did not request Ellman's counsel to prepare an order at that time, nothing in the Record indicates that Ellman's counsel was prohibited from presenting an order to the court for signature. Therefore, Ellman could have taken further action to have his constitutional claims fairly presented to the state Appellate Division and failed to do so." Court of Appeals Decision, Slip op. at 12; *see also id.* at 15 ("Ellman and his counsel failed to take advantage of the available procedures."). As such, this evidence should be included in the Record before further appellate review in this case.

The Court of Appeals held that Ellman's voluntary withdrawal of his state appeal could not satisfy the federal habeas exhaustion requirement. *Id.* at 13. Nevertheless, the omitted evidence should be admitted as "material" pursuant to Rule 10(e), and necessary for a complete and true Record. This is so even if the evidence may not be dispositive. Motion granted.

SO ORDERED.

Dated: White Plains, New York
January 18, 1995

/s/ Charles Brieant

Charles L. Brieant
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of January on thousand nine hundred and ninety-five.

UNITED STATES COURT OF APPEALS
FILED
FEB 06 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

KENNETH ELLMAN,

Petitioner-Appellant,

v Dkt No: 93-2819

R.E. DAVIS, Warden, Westchester County Penitentiary,

Respondent-Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Kenneth Ellman.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Carolyn Clark Campbell

Carolyn Clark Campbell
Chief Deputy Clerk

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inbancdn_frm

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of January on thousand nine hundred and ninety-five.

UNITED STATES COURT OF APPEALS
FILED
FEB 06 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

KENNETH ELLMAN,

Petitioner-Appellant,

v Dkt No: 93-2819

R.E. DAVIS, Warden, Westchester County Penitentiary,

Respondent-Appellee.

A Motion for hearing in banc to "inform the En Banc Court of new Record" having been filed herein by the appellant Kenneth Ellman.

Upon consideration by the panel that decided the appeal, it is Ordered that said motion for hearing is **DENIED.**

It is further noted that the suggestion for hearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Carolyn Clark Campbell

Carolyn Clark Campbell
Chief Deputy Clerk

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 93-2819

KENNETH ELLMAN,	:	
	:	
Petitioner-Appellee,	:	STENOGRAPHIC
	:	TRANSCRIPT OF
vs.	:	PROCEEDINGS
	:	
R. E. DAVIS, WARDEN,	:	
	:	
Respondent-Appellant.	:	

September 21, 1994
Second Circuit Court of Appeals

B E F O R E:

HONORABLE JOSEPH M. MC LAUGHLIN
HONORABLE ROGER J. MINER
HONORABLE ELLSWORTH A. VAN GRAAFEILAND

A P P E A R A N C E S:

KENNETH ELLMAN
Petitioner-Appellee
Appearing Pro Se

PAMELA MANN, ESQ.
Chief, Charities Bureau
Office of the New York Attorney General
Attorney for the Respondent-Appellant

COMPUTER TRANSCRIPTION BY

JOHN J. PROUT, JR. & ASSOCIATES
65 SPRINGFIELD AVENUE
SPRINGFIELD, N.J. 07081
(201) 379-7015 FAX (201) 379-7336

JUDGE MINER: *Ellman against Davis.*

All right, Mr. Ellman, you may proceed.

MR. ELLMAN: I think there's a mistake, your Honor, I'm not appealing the order, the Attorney General is.

JUDGE MINER: Oh, I'm sorry, you're right. That's correct. All right, Miss Mann.

MR. ELLMAN: Sorry.

JUDGE MINER: We've got musical chairs here. All right. Yes, Mr. Ellman, you're the respondent.

MS. MANN: Good morning, your Honors.

JUDGE MINER: Good morning.

MS. MANN: I'm Pamela Mann, Chief of the Charities Bureau in the New York Attorney General's Office. This is an appeal from a decision granting a writ of habeas corpus to a petitioner who was jailed for civil contempt after failing to turn over to the Court upon its order seventeen handguns.

After filing his federal petition for a writ of habeas corpus in April 1993, petitioner voluntarily and deliberately withdrew two appeals pending before the New York Appellate Division, effectively denying the state appellate courts the

opportunity to correct any constitutional defects which might have arisen with respect to his incarceration.

The Federal Court found that the withdrawal of these appeals "by closing the door, in effect provided any finality which might have been lacking". Plus, the decision from which we appeal turns the deliberate withdrawal of appeals into finality, and in effect turning –

JUDGE MINER: Well, the district judge felt otherwise, did he not? He said that this man got turned away at every juncture in the state process and therefor needed some federal relief.

MS. MANN: Yes, your Honor, he did find that, but I believe that that is not supported by either the record or the prevailing law. The only resort that this defendant took to the State Courts, which he pursued, were procedurally defective. And two procedurally effective matters of review which were pending at the time that he brought on his federal action he voluntarily withdrew after his petition was filed. And there is under the prevailing law, Judge, even the law that existed at the time of *Fay v. Noya*, a deliberate bypass which deprived the State of its ability to correct these errors disqualified him from federal relief. In fact even this deprival of the State where due process had been inadvertent under the later case law, for instance *Coleman v. Thompson*, this would have been sufficient to deny him relief.

JUDGE MINER: Did the Federal – did the State Court ever have an opportunity to pass on his claim?

MS. MANN: No. The only opportunities that were presented were two writs of prohibition brought before the Appellate Division which are extraordinary remedies akin to Mandamus in which the Supreme Court has found do not

satisfy the exhaustion requirement, and one appeal from an order of incarceration which was found to be defective in that it was based on a "so-ordered transcript", which was not found to be an appealable paper. I think it's important to understand that at the time –

JUDGE MINER: Why didn't somebody submit an order? The Appellate Division – perhaps in our system we would consider that so-ordered sufficient, but I guess they didn't in the State Court. Why didn't somebody submit a more formal order, including your office?

MS. MANN: Our office did not because the Court indicated it would pursue it in this way and in other Appellate Divisions in the New York State system this is accepted as an appealable order. The other question which is not answered on this record and which the District Court did not address is why the petitioner's attorney, who was at the hearing when this issue was made and objected to –

JUDGE MINER: Well, Yes, I can't understand that either. He said this is insufficient, Judge, this won't be good enough, and that's all he did. He said the transcript wouldn't be good enough to form the basis for an appeal, and it turned out he was right, but he never submitted an order to that effect, did he?

MS. MANN: That's right, your Honor.

JUDGE MINER: To appeal from. It seems the district judge faulted the Court for not putting it in proper form.

MS. MANN: But I believe the District Court erred in relying so heavily on the fact that this appeal was dismissed, because there were at that very moment two effective methods of appeal which were pending before the Appellate Division

which this petitioner chose to turn his back on. Under the prevailing law this is simply not good enough under exhaustion. There is no evidence in the record that it would have been futile to present these appeals to the Appellate Division, and under the prevailing case law one would have to show much, much more than even is indicated as facts, unsupported facts, in the District Court opinion.

JUDGE MINER: I get somewhat a feeling of uneasiness on the merits of this matter. Why is it that you're persisting in this case when this appellee now has his guns in New Jersey where they're fully licensed and in his possession? Why do you need to – I suppose you want to vindicate the authority of the Courts, maybe, but as a practical matter, for what, for what do you pursue this?

MS. MANN: Well, for the practical effect that would – that was contemplated by the State Court and by the parties throughout this litigation, namely to determine at the end of the litigation what should happen with these guns, whether they –

JUDGE MINER: But you want to keep him in custody for contempt for possessing weapons that he now legally possesses in another state.

MS. MANN: That was not found – that's not appropriate to be found on summary judgement here, your Honor, it is contested by statements made by the petitioner himself that are before the Court --

JUDGE MINER: Is it your contention he doesn't have authority to have these weapons in New Jersey?

MS. MANN: We have no information as to whether he has authority.

JUDGE MINER: You have no information. Did you ever check?

MS. MANN: We checked, but we have no independent facts. He apparently does have a license to possess them in New Jersey.

JUDGE MINER: But what interest is it of the State of New York now that he turn over these weapons when he has them in New Jersey validly licensed? What is the interest?

MS. MANN: The interest is because they were obtained pursuant to authority of a New York Not-For-Profit. He would never have obtained these guns if it hadn't been for that authority and –

JUDGE MINER: Well, what do you want him to do? Why do you want to keep him in jail for contempt until he does what? This is a civil contempt confinement, until he does what?

MS. MANN: Until he turns over the guns to the custody of the court so that there can be a hearing as to whether he obtained them with his own funds or whether they are properly the property of the Westchester SPCC, in which case they would be disposed of as the Court found to be fit. If it's determined that he purchased these with his own funds and held – holds them under valid authority, then they would be returned to him. But I think it's – I think, your Honor –

JUDGE MINER: They would be returned to him in New York where he doesn't have a license for them, then you could arrest him again.

MS. MANN: No, your Honor, this is not a game. These were serious –

JUDGE MINER: Sounds like it to me, because you keep pursuing this case and I don't understand – I still don't understand why. Now your story is that you want to find out whether these guns belong to this dissolved corporation, the society in Westchester, that's the basis for this now?

MS. MANN: Well, initially the implication of your question is correct, at the time that the order was entered our concern was that he had these guns and he didn't have proper authority. At the time that the Westchester SPCC was dissolved, which was many months later, the interests became different.

JUDGE MINER: Is that what you're getting at now, whether these guns are the assets of this dissolved corporation? What is your ultimate goal in this case?

MS. MANN: That is our ultimate goal, but I think it is incorrect as a matter of law, frankly, your Honor, to minimize the importance of the state court being able to enforce its own orders. I think the record shows that this is a person who repeatedly –

JUDGE MINER: Well, I know you're getting back to the state courts, but I'm just pursuing this one phase of the case, the merits part of it. And is it the duty of the Attorney General to see that the assets are properly distributed on the dissolution of this corporation, is that it?

MS. MANN: Yes, yes, it's clear under state law that the Attorney General has that duty and the dissolution statutes of the State of New York do contemplate that there be post dissolution proceedings where all of the property of the Not-For-Profit is distributed, and in fact in the order contrary to the finding of the District Court, in the dissolution order, those procedures are contemplated and the case is not over –

JUDGE MINER: Well, if you have jurisdiction over his person and you can inquire into that in the proceeding in state court as to ownership, why is it necessary to keep him in jail during that time? You want to have a hearing, you want to see who owns the guns. If the dissolved corporation owns them, you'll see that the proceeds are distributed. If he owns them, you say you'll give them back to him. Why does all this necessitate keeping a man in jail and getting over here the guns that are in New Jersey, if he subjects himself to this proceeding in New York?

MS. MANN: Well, that was never the case that was presented. What was presented was a repeated pattern of contempt, and so an outstanding warrant for arrest for contempt, and the petitioner was arrested.

JUDGE MINER: Well, did he ever indicate that he would not participate in a hearing to determine the ownership of these guns?

MS. MANN: No, he never did. But he also never indicated that he would turn over the guns, and gave no cogent reason as to why –

JUDGE MC LAUGHLIN: But you don't need the guns to determine title to them. You can do that without the physical possession of the guns. Why do you want to throw him in jail for not giving you the guns?

MS. MANN: Your Honor, I think that's correct that you could determine that without putting him in jail, but this is post facto –

JUDGE MINER: Well, we're here post facto. I mean we're faced with the facts as they exist now. It's pretty serious to keep somebody in jail to coerce him to do something that he's

willing to do, and that is participate in a proceeding to determine who owns the guns.

MS. MANN: Well, your Honor, perhaps I misspoke, he never said whether or not he was willing to participate in a hearing. He did not indicate that he was willing affirmatively as far as –

JUDGE MC LAUGHLIN: If he does that today, will you go away?

MS. MANN: Excuse me?

JUDGE MC LAUGHLIN: If he states that willingness today, will you go away?

MS. MANN: If this court were to dismiss the petition that he were remanded back to the state courts, we would consider if he did not –

JUDGE MC LAUGHLIN: You'll go away when he's in jail.

MS. MANN: Your Honor, we would want to see what happened when this petition, which we believe was erroneously granted, was reversed. We believe he has an obligation to comply with the law. If he were to comply with the law and submit the guns, we certainly would go away.

JUDGE MINER: All right, thank you.

All right, we'll hear from Mr. Ellman.

MR. ELLMAN: Your Honor, there's a number of issues here affecting credibility of the Attorney General, her candor, and also the problem which the Court has directly addressed

which was why is the Attorney General pursuing this and what is the authority of the Attorney General to pursue it. I can't explain why the Attorney General is pursuing it. It makes no sense to me nor to anybody else.

JUDGE MINER: Do you have any problem participating in a proceeding to determine who owns these guns?

MR. ELLMAN: Judge, I have no problem in appearing at any court at any time I'm supposed to appear including that proceeding. But I think the record is very clear. I think we have a situation where the Deputy Bureau Chief David Samuels stated to the District Court that I purchased the guns with my own funds, he stated that unequivocally on the record. We had a full hearing that was held in the State Court.

JUDGE VAN GRAAFEILAND: That's what you say, Counsel, but how do we know that's true.

MR. ELLMAN: No, I'm saying that's what the Deputy Attorney General stated in the District Court, your Honor.

JUDGE VAN GRAAFEILAND: What did the Deputy District Attorneys state?

MR. ELLMAN: The Deputy Attorney General David Samuels stated to Judge Brieant very clear that these guns were purchased with my own money when he was questioned by the judge.

JUDGE MINER: He conceded that already, is that it?

MR. ELLMAN: Yes, that was fully conceded.

JUDGE VAN GRAAFEILAND: Let's go back, let's go back a little while, Counsel. On July 31st, 1989 you were ordered to turn these guns in, were you not?

MR. ELLMAN: I didn't hear you, your Honor.

JUDGE VAN GRAAFEILAND: You were ordered to turn these guns in by an order of July 31, 1989, were you not?

MR. ELLMAN: Judge, I don't read the order that way. With all due respect to the Court, I think the order is very clear. I think it ordered me to comply with section 2.10-7A of the Criminal Procedure Law of New York State which took away a exemption that peace officers have –

JUDGE VAN GRAAFEILAND: Counsel, did you comply with that order or didn't you?

MR. ELLMAN: Judge, I believe there was nothing I could do.

JUDGE VAN GRAAFEILAND: What do you mean there was nothing you could do? "Here are the guns", that's all you could do.

MR. ELLMAN: Judge, I was living in New Jersey at that time.

JUDGE VAN GRAAFEILAND: I don't care where you were living, you had a Supreme Court order from the New York State Supreme Court judge telling you to do something, and you just disregarded it. Isn't that right?

MR. ELLMAN: Judge, I did not. I would always fully obey any order that a court directs me to obey. But that order

did not direct me to surrender guns, and it does not say that and a clear reading of it indicates that.

JUDGE VAN GRAAFEILAND: What does it say then?

MR. ELLMAN: It actually mentions –

JUDGE VAN GRAAFEILAND: What does it direct you to do?

MR. ELLMAN: It mentions complying and obtaining a license, your Honor, pursuant to section 2.10-7A of the Criminal Procedure Law.

JUDGE VAN GRAAFEILAND: Does it mention the guns at all?

MR. ELLMAN: Yes, it says I must –

JUDGE VAN GRAAFEILAND: What does it say about the guns?

MR. ELLMAN: It says I must obtain a license for those firearms, your Honor.

JUDGE MC LAUGHLIN: And you did.

MR. ELLMAN: What did he say?

JUDGE MC LAUGHLIN: And you did.

MR. ELLMAN: And I did, your Honor But I obviously could not obtain a New York State license, I was no longer a resident here.

JUDGE VAN GRAAFEILAND: Counsel, what has that got to do with a July 31, 1989 order?

MR. ELLMAN: Your Honor, that order very clearly states, I respectfully ask the Court just to try and understand my point of view, I read the order as it states, I interpreted it as its plain meaning, your Honor. And when I read New York State Criminal Procedure Law section 2.10-7A, which didn't even exist until after I had become a domicile of the State of New Jersey, I went ahead and said what that order meant is what a common sense interpretation would be, that you can't carry a gun in New York any longer without a pistol license.

JUDGE VAN GRAAFEILAND: The judge found you in contempt for failing to obey that order, didn't he?

MR. ELLMAN: Yes, he did, your Honor.

JUDGE VAN GRAAFEILAND: Well, now you say your decision as to whether you obey the order is better than the judge who made the order.

MR. ELLMAN: No, I have no right to make such a decision, your Honor. I have no role to play after the argument is made and the Court makes the decision. I agree with that. But what I'm trying to say to the Court is at no time in the state court proceeding was it ever alleged that I had property belonging to another person. The 1989 order, your Honor, very clearly showed that in statement after statement, including the actual arrest warrant documents, that they were attempting to enforce section 2.10-7A of the Criminal Procedure Law, and a voluntary surrender provision –

JUDGE VAN GRAAFEILAND: Instead of being here and arguing all of this, why didn't you go to the State Court where the order was entered? Why are you in Federal Court?

MR. ELLMAN: Could you please repeat that?

JUDGE VAN GRAAFEILAND: Why are you in Federal Court saying that the State Court had no right to issue an order against you?

MR. ELLMAN: I'm in Federal Court, your Honor, because the State Court would not address these issues. It would not permit me to get these issues into a forum that it would address. I did everything humanly –

JUDGE VAN GRAAFEILAND: They would not permit you to do what?

MR. ELLMAN: They would not permit me – it would not hear my appeals. I did everything humanly possible –

JUDGE VAN GRAAFEILAND: They would permit you to hear your appeal. Your first appeal was dismissed because it wasn't properly filed. You knew that, didn't you?

MR. ELLMAN: No, your Honor, I don't think I had any appeal that wasn't filed –

JUDGE VAN GRAAFEILAND: You mean this came as a surprise to you when they dismissed your first appeal? Didn't the government say they were going to move to dismiss it because it wasn't properly taken?

MR. ELLMAN: Before my incarceration? I'm trying to –

JUDGE VAN GRAAFEILAND: You made two appeals – you made an appeal to the Appellate Division, it was dismissed because it was not an appeal taken from an order. Isn't that right?

MR. ELLMAN: That was one of the last appeals I made, your Honor.

JUDGE VAN GRAAFEILAND: I don't care which one. Wasn't that right?

MR. ELLMAN: Yes, I was served with a notice of entry, your Honor, from the Attorney General, where I was told that this is the authority by which you're being kept in prison. And I wasn't just given a transcript, I was given a so-ordered transcript with an attached notice of entry.

JUDGE VAN GRAAFEILAND: You keep talking, all I want is a simple answer to my question. You knew that was going to be dismissed because it was not taken from the proper order and it was dismissed, so then you filed another notice of appeal, did you not?

MR. ELLMAN: Your Honor –

JUDGE VAN GRAAFEILAND: An order was entered, an order was entered, and then you filed another appeal. And there was nothing wrong with that appeal, was there?

MR. ELLMAN: No, I did not file any notices of appeal after I perfected that appeal, to my recollection, your Honor.

JUDGE MINER: Isn't it true that you moved to withdraw appeals just before you filed in the District Court? In other words there was the belated order of January 13th that should have been entered months ago, but it was filed January 13th. There was another order entered January 14th recommitting you to custody, and you filed appeals from those orders, those January orders.

MR. ELLMAN: I did file notices of appeal, your Honor.

JUDGE MINER: Right. Now what happened to those notices of appeal?

MR. ELLMAN: I filed notices of appeal and I filed those notices of appeal before I had perfected and filed my written briefs which I believe the Court has. What I did, your Honor, when I was served with that notice of entry and that so-ordered transcript, which was one in a course of attempts I made –

JUDGE MINER: You're getting away, I'd just like a direct answer to my question as to notices of appeal that you filed with respect to those two orders, the very last notices of appeal in the State Court. What did you do after you filed those notices?

MR. ELLMAN: I withdrew them.

JUDGE MINER: You withdrew them. And had you at that time commenced the federal habeas corpus?

MR. ELLMAN: Yes, I had.

JUDGE MINER: So you commenced the federal habeas corpus and withdrew those two?

MR. ELLMAN: I withdraw – that's correct, your Honor.

JUDGE MC LAUGHLIN: Why did you do that, why did you withdraw those appeals?

MR. ELLMAN: I withdrew those appeals because I believed that I had given the State of New York so many opportunities to address this issue and I could not understand and still to this day –

JUDGE VAN GRAAFEILAND: Counsel, that was very noble of you to give the State of New York these opportunities.

MR. ELLMAN: Judge, it's not –

JUDGE VAN GRAAFEILAND: It's not – you're not the one who makes the decisions about opportunities, Counsel. When the State makes ~~an order,~~ your duty is to obey it. Now, you filed the second notices of appeal which meant that the State would hear the argument that you're making right now, would they not?

MR. ELLMAN: I don't believe that there's any indication that the State would hear the argument for this reason, that in my perfected appeal of the so-ordered transcript I brought up all the writ of prohibitions all over again, I attached the entire writ of habeas corpus, and I asked the Appellate Division to hear all of these issues. It was not just a –

JUDGE MINER: Well, they dismissed it on a technical point. They said so-ordered wasn't sufficient, you needed a decision. And ultimately – I mean you needed an order. And ultimately the orders – the appealable orders were filed. And when you filed a notice of appeal from them ultimately, you must have felt that you could pursue that appeal at that time. Why did you file the notices of appeal?

MR. ELLMAN: I did not believe I had to file anymore appeals after I perfected the last –

JUDGE MINER: But why did you file the notices of appeal?

MR. ELLMAN: They were filed before I perfected my last appeal, your Honor.

JUDGE MINER: For what purpose?

MR. ELLMAN: I suppose to someone like myself who didn't know what to do in the situation I was in, I just said whatever orders I had let me just file notices of appeal. I'm telling you what I thought at that time. I didn't know what I could perfect, I didn't know what capability time wise and effort wise being in prison I would have. I felt I was able to complete this one appeal, which I did, a brief and record. This is in a long time of attempts to get some type of review by the appellate process.

I had read the case in the New York State Court of Appeals of *La Rocca v. Lane* which clearly stated unmistakably that the proper method to challenge a civil contempt is to use a writ of prohibition. I did that and took that to the Court of appeals. I couldn't get a proper order from the State Court on a habeas corpus because they wouldn't give it to me, and I had never heard of the losing side having the responsibility to prepare an order. The Court wouldn't prepare the order after denying me –

JUDGE MINER: The losing side often prepares an order, so that there's something to appeal from. That's not unusual in the state practice.

MR. ELLMAN: My attorney did submit an order, but the Court wouldn't sign that order and the Court's final disposition of that habe indicates he asked him to resubmit another order.

JUDGE MINER: Did he?

MR. ELLMAN: I have no knowledge except I know for a fact that the order was actually submitted to the State Court, yes. The order was submitted to the State Court and the Court

didn't want to sign that order on that habe. That was not my fault. The Attorney General had no interest in submitting an order, for whatever reason. The Court didn't submit an order. So I was now sitting in prison with no order. I had a habeas corpus denied but no order in which to appeal.

I then read *La Rocca v. Lane* and I filed writs of prohibition. I took those writs of prohibition as the State Court of Appeals said I could do, and I followed that to the end. Then I was served with further on a so-ordered transcript with a notice of entry, your Honor. This wasn't just some document that a judge so-ordered, it was an actual notice of entry telling me that this is the authority I'm being kept in prison, and it was in response to the demand of the Corrections Department of Westchester County –

JUDGE MINER: But there came a time when the Appellate Division said this is not an appealable order for whatever reason. How about submitting the appealable order at that time? Did you have any reason to believe that the judge wouldn't sign it?

MR. ELLMAN: Your Honor, at that time I had been in prison for nine months, attempting to get out on a civil contempt having been asked to comply with a section of the law that didn't exist at the time I moved to New Jersey. I didn't know what else to do. I question the authority of the State of New York to even enforce its criminal procedure or penal laws in the State of New Jersey, and I find it very bizarre that they would come in here and argue, your Honor, that they're attempting to find out who owns property and that's why they kept me in prison. They never –

JUDGE MINER: All right, thank you.

JUDGE MC LAUGHLIN: Are you a lawyer, Mr. Ellman?

MR. ELLMAN: No, I am not.

JUDGE MINER: All right. Any rebuttal? Step up here, please.

JUDGE MC LAUGHLIN: You've got a rebuttal, it you want to use it.

JUDGE MINER: I don't know if you reserved any time for rebuttal.

MS. MANN: I did not reserve any time, but I would be happy to –

JUDGE MINER: Well, I have a question for you. Your adversary says that a Deputy Attorney General conceded that he was the owner of these weapons. Is that true?

MS. MANN: He made a statement to that effect that was corrected in our previous statement that was filed, that was a statement made at the initial hearing of –

JUDGE MINER: This is not an afterthought, this question of who owns the weapons, is it?

MS. MANN: No, it's not an afterthought. But we had known that the issue would be presented at one time, and frankly as is reflected in the record in his appeal at the time of the contempt, the attorneys who were handling that hearing specifically said that they did not consider the ownership issue to be relevant at the time of contempt, but that it would only be relevant at the end of the case. And indeed in that transcript there is a specific reference to the fact that these guns are not being confiscated, but that at the end of hearing – at the end of case there would be a hearing as to their disposition.

JUDGE VAN GRAAFEILAND: One more question, Counsel. If this matter were remanded, the Court would – would the State object to reinstating the appeals that were taken to the Appellate Division which your opponent withdrew?

MS. MANN: No, your Honor, we would not object to his appeal being reinstated.

JUDGE VAN GRAAFEILAND: In other words you would urge it to get it over with I assume?

MS. MANN: We would be happy to have this matter over with, but we believe that the law requires that the State be given an opportunity to correct whatever constitutional –

JUDGE MINER: But his appeals were withdrawn. You may not object to the Appellate Division hearing these appeals, but would the Appellate Division accept these appeals at this point?

MS. MANN: I don't know that, your Honor.

JUDGE MINER: Well, I mean it's an important thing. You want us to reverse which puts him back in jail, and we don't know whether he's going to have an opportunity to get out. And you're saying send it back to the State Court because they should get the first crack at it. And you can't tell us whether they'll take a crack at it at all.

MS. MANN: Well, no, I believe that they could take a crack at it, I'm not sure whether they could take a crack at it in any of these appeals that were dismissed.

JUDGE MINER: Well, what is he going to appeal from?

MS. MANN: He could appeal from the denial of –

JUDGE MINER: Have you ever heard of Catch 22? That seems to be what he's in.

MS. MANN: No, I don't believe he's in a Catch 22 because there is pending now in the State Court a motion that he made to dismiss the State Court action overall and to find that his incarceration was improper. If that motion were denied –

JUDGE MINER: Wait a minute, the State Court action, what action is that?

MS. MANN: The action that the District Court said is over but in fact continues.

JUDGE MINER: Of the dissolution of the corporation?

MS. MANN: There are post dissolution proceedings that continue.

JUDGE MC LAUGHLIN: Those are the ones you're talking about?

MS. MANN: These are the ones I'm talking about, although –

JUDGE MINER: And it is in connection with those proceedings that you want to hold him in contempt?

MS. MANN: No. What I'm saying, your Honor, is that your concern, which is certainly a legitimate one, is what would happen if he were remitted to the State Courts –

JUDGE MINER: That's right.

MS. MANN: And I'm saying he would have an opportunity –

JUDGE VAN GRAAFEILAND: That's what we want to know. If he's going to have a remedy if we sent him back to State Court –

MS. MANN: Yes, he would.

JUDGE VAN GRAAFEILAND: – and if so, what is it?

MS. MANN: His remedy is to appeal a denial of the motion to dismiss assuming that that's what the District Court would do.

JUDGE MINER: But that doesn't bring up automatically his contempt and his incarceration. You're talking about the dismissal of some kind of dissolution proceedings, we're concerned about the order that commits him.

MS. MANN: I understand that, your Honor, and the motion to dismiss is part of the record in this appeal and it does raise these same issues. If he were to proceed with these, he would have an opportunity to have his constitutional challenge to his incarceration corrected.

JUDGE MINER: You will assist him, do you represent to us that you will assist him in bringing before the State Court if we reverse this case the contentions he wishes to raise so that this matter may be resolved?

MS. MANN: Yes, your Honor, yes, we certainly represent that. We have never stood in the way of his having these claims heard.

JUDGE MINER: Well, you haven't furnished him a great deal of assistance either.

MS. MANN: We, we – this is an adversary system, and we did not –

JUDGE MINER: Oh, I know that it's an adversary system, you don't have to explain that to me.

MS. MANN: He was represented by counsel, your Honor.

JUDGE MINER: That's correct, he was represented by counsel and it's an adversary system, but you won, and you never submitted the order.

MS. MANN: We did submit an order. We submitted –

JUDGE MINER: Ultimately.

MS. MANN: Yes, we submitted orders –

JUDGE MINER: Ultimately.

MS. MANN: But I think that the law is clear that –

JUDGE MINER: And it doesn't have to be less of an adversary system if you assist your pro se opponent in bringing the question before the Court. Does it? After all, you do represent the people of the State of New York.

MS. MANN: Yes, your Honor, and we – I have represented that we would certainly assist in whatever way we could to have this matter heard.

JUDGE MINER: All right. That's all I'm asking you. Thank you.

MS. MANN: Thank you, your Honor.

JUDGE MINER: Decision is reserved.

CERTIFICATE OF OFFICER

I, PATRICIA A. NIEMIEC, a Certified Shorthand Reporter and a Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as transcribed.

I DO FURTHER CERTIFY that I am neither a relative nor employee, nor attorney or counsel to any parties involved; that I am neither related to nor employed by any such attorney or counsel, and that I am not financially interested in the action.

/s/ Patricia A. Niemiec
A NOTARY PUBLIC OF THE STATE OF NEW JERSEY
My Commission Expires:
September 21, 1994
C.S.R. License No 993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

KENNETH ELLMAN,

Plaintiff,

v.

R. E. DAVIS, Warden, Westchester County Penitentiary, Valhalla, New York,

Defendant.

93 Civ. 2164 (CLB)
White Plains, N.Y.
April 16, 1993
11:20 a.m.

----------x

Before:

HON. CHARLES L. BRIEANT,

District Judge

APPEARANCES

NEEDLEMAN & SCHOKET
Attorneys for Plaintiff
GARY NEEDLEMAN

ALTHEA RICHARDSON
Assistant County Attorney
County of Westchester
For Defendant

ROBERT ABRAMS
Attorney General, State of New York
DAVID G. SAMUELS
Assistant Attorney General

* * *

THE COURT: Did he pay for them with his personal funds?

MR. SAMUELS: Yes he did.

THE COURT: Is his possession of them in New Jersey lawful?

MR. SAMUELS: There is a question about that.

THE COURT: Well, you can brief that question, too.

In the meantime, since he has been in the can for nine months, I would like to talk about a bail package, and I will give you a date for a hearing. My inclination is to permit him bail. It involves either noncriminal behavior, which occurred in Jersey, anyway, and which does not seem to have any answer to it. And it is ridiculous.

You know, if a person went down on the streets of the Bronx and bought a firearm, bought a Saturday-night special, and assuming the serial number has not been altered, or anything like that, and he carries it over to New Jersey, he can keep it in New Jersey. The only one who can take it away from him is either federal ATF people or New Jersey authorities.

And here, with all the crime in New York, you are fooling around with something in New Jersey. I do not see why.

* * *

EXCERPTS FROM PROCEEDINGS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PEOPLE OF THE STATE OF NEW YORK by ROBERT ABRAMS, Attorney General of the State of New York, Plaintiff, vs. WESTCHESTER COUNTY, S.P.C.C., a Not-For-Profit Corporation, and KENNETH ELLMAN and JOHN and JANE DOE, as Officers and/or Directors and/or agents of the Westchester County S.P.C.C., Defendants.	INDEX NO. 22360/87

Courthouse
White Plains, New York

February 5, 1991

Before:

HON. ALDO A. NASTASI,

Justice.

Appearances :

HON. ROBERT ABRAMS
Attorney General, State of New York;
120 Broadway
New York, N.Y. 10271
BY: SEAN DELANY, ESQ.,
of Counsel.

LANKENAU & BICKFORD, ESQS.
Attorney for Defendant
Westchester County S.P.C.C.;
1740 Broadway
New York, N.Y. 10019
BY: DAVID COHEN, ESQ.
of Counsel.

MR. KENNETH ELLMAN
Defendant, pro se;
Box 18
Newton, N.J. 07860

Jerry Pellis, C.S.I.
Official Court Reporter.

COLLOQUY

* * *

MR. DELANY: With regard to Mr. Ellman's objection that somehow the order does not find that he owns these handguns and that this therefore is not a confiscation proceeding, I would advance, your Honor, that that goes beyond the scope of this hearing. Mr. Ellman adduced evidence that he owns the handguns. The Attorney General did not choose to challenge that evidence, because quite frankly, your Honor, under the order of July 1989 it doesn't matter. The order said any handguns that he acquired or which were registered pursuant to SPCC authority. Therefore whether he owns the handguns today, as your Honor observed repeatedly during the hearing, is beside the point. This order should not contain, therefore, such a provision.

* * *

MR. ELLMAN: Your Honor, I just want the record to reflect that my presence here today is not a waiver of any rights or objections I previously stated to the proceedings, that

I still believe the court is without subject matter jurisdiction over these firearms, that it is still believed the order of the court violates the appropriate provisions that I had cited previously of New Jersey law, New York law and of constitutional protections related to ex post facto laws, searches and seizures without probable cause and relating to confiscation of property without proper compensation. Those issues have not been addressed, particularly in this order, and I further object and feel that it is a violation of due process for any relief to be applied to from this court without notice, even if it was one day's notice to all parties to the proceeding.

* * *

EXHIBIT IN STATE AND FEDERAL RECORDS

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF STATE POLICE

COLONEL D. B. KELLY
SUPERINTENDENT

RECORDS AND
IDENTIFICATION SECTION
POST OFFICE BOX 68
WEST TRENTON, NEW
JERSEY 08625

January 13, 1975

Mr. Kenneth Ellman
R.D.#3, Box 651
Newton, New Jersey

Dear Sir:

This is to advise that your application for a:

[x] Firearms Purchaser Identification Card

[x] Permit to Purchase a Pistol or Revolver

[ ] Permit to Carry a Pistol or Revolver

has been approved and this permit is enclosed for your use.

Assuring you of our desire to be of service whenever possible, I am

Sincerely yours,

/s/ D B Kelly

Colonel D.B. Kelly
Superintendent

STATE POLICE NJ

Special & Technical Services Section

NEW JERSEY STATE POLICE
STATE REGULATORY BUREAU
P.O. BOX 7068
WEST TRENTON, N.J. 08628-0068
(609) 882-2000 EXT. 2489

FIREARMS INVESTIGATION UNIT EXT. 2663

PRIVATE DETECTIVE UNIT EXT. 2671

FAX NO. — (609) 771-8153 DATE — 5/ 19/ 93

****

TRANSMITTAL SHEET

TO: John DeRosa

N.Y. Attorney General's Office

FAX NO. 212-416-8773

NUMBER OF PAGES 4 INCLUDING TRANSMITTAL SHEET

FROM: NJ State Police—Firearms Inv. Unit

FLORA

****

GF1OL24 05/19/93

NEW JERSEY STATE POLICE FIREARMS INVESTIGATION UNIT SUBJECT REPORT

NAME **ELLMAN, KENNETH** SBI FIU ID **55215**
DOB 09/29/51 SEX HT WT HAIR EYES

CURRENT ADDRESS PO BOX 18 DATE 02/04/91
NEWTON NJ

PRIOR ADDRESS BX 651 RD3 DATE 01/01/66
NEWTON NJ

FIREARM: MAKE SMITH AND WESSON MODEL
TYPE H SERIAL R134353 BORE 38 CAL
OWNER FROM **11/10/90** TO DOC VR 1
SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL
TYPE R SERIAL 1043519 BORE 357MAGNUM
OWNER FROM **11/10/90** TO DOC VR 1
SELLER FIU ID

FIREARM: MAKE BAVER MODEL
TYPE H SERIAL 052826 BORE 25 CAL
OWNER FROM **11/10/90** TO DOC VR 1
SELLER FIU ID

FIREARM: MAKE COLT MODEL
TYPE H SERIAL F43737 BORE 38 CAL
OWNER FROM **11/10/90** TO DOC VR 1
SELLER FIU ID

FIREARM: MAKE COLT MODEL
TYPE H SERIAL E82063 BORE 357MAGNUM
OWNER FROM **11/10/90** TO DOC VR 1
SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL
TYPE H SERIAL 1D43192 BORE 357MAGNUM
OWNER FROM **11/10/90** TO DOC VR 1

SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL
TYPE H SERIAL AFR9701 BORE 38 CAL
OWNER FROM **11/10/90** TO DOC VR 1

SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL
TYPE H SERIAL 4K46121 BORE 357MAGNUM
OWNER FROM **11/10/90** TO DOC VR 1

SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL
TYPE H SERIAL 6K52028 BORE 357MAGNUM
OWNER FROM **11/10/90** TO DOC VR 1

SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL
TYPE H SERIAL 3D54406 BORE 38 CAL
OWNER FROM **11/10/90** TO DOC VR 1

SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL
TYPE H SERIAL 1D30635 BORE 357MAGNUM
OWNER FROM **11/10/90** TO DOC VR 1

SELLER FIU ID

FIREARM: MAKE COLT MODEL PYTHON
TYPE H SERIAL E82063 BORE 357MAGNUM
OWNER FROM **01/01/66** TO DOC FR 250967

SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL 469
TYPE H SERIAL A866928 BORE 9MM
OWNER FROM **11/10/90** TO **02/04/91** DOC VR 1
SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL 59
TYPE H SERIAL A456535 BORE 9MM
OWNER FROM **11/10/90** TO **02/04/91** DOC VR 1
SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL 59
TYPE H SERIAL A390101 BORE 9MM
OWNER FROM **11/10/90** TO **02/04/91** DOC VR 1
SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL 29
TYPE H SERIAL N404647 BORE 44 CAL
OWNER FROM **11/10/90** TO **02/04/91** DOC VR 1
SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL 65
TYPE H SERIAL 1D43612 BORE 357MAGNUM
OWNER FROM **11/10/90** TO **02/04/91** DOC VR 1
SELLER FIU ID

FIREARM: MAKE SMITH AND WESSON MODEL 659
TYPE H SERIAL TAC7856 BORE 9MM
OWNER FROM **11/10/90** TO **02/04/91** DOC VR 1
SELLER FIU ID

MESSAGE: **END OF REPORT**

NEW JERSEY STATE POLICE FIREARMS
INVESTIGATION UNIT
FIREARMS APPLICATION

GFICM 16.04 05/19/93

SUBJECT:
NAME ELLMAN, KENNETH
ADDRESS PO BOX 18
CITY NEWTON **STATE** NJ **ZIP** _____
SSNO _____
SBI 557016A **FIU #** 55215
DOB 09/29/51 **SEX** M **HT** 5 07 **WT** ___
HAIR BLN **EYES** ___
SUBJECT STATUS: _ **DATE:** ____
DOC REF. _____
COMMENT _____
APPLICATION:
TYPE AID PURCHASER ID CARD
RENEWAL NO 226438
DATE 08/11/74 **SOURCE** SP0212 FIREARMS UNIT
PROCESS FEE _____ **FINGERPRINTED** ___
CHECK # ____ **DATE** _____
RECORDS SECTION DATE _____
INSPECTION DATE _____
FORWARDING DATE _____
ISSUE AUTHORITY SP0212 FIREARMS UNIT
DISPOSITION DATE 01/13/75
PERMIT/LICENSE #_____ **EXPIRES** _____
APPLICATION STATUS A APPROVED
DATE 01/13/75 **DOC REF.** AID 2
COMMENT
NEW APPLICATION STATUS
DATE _____ **DOC REF.** _____
COMMENT _____
MESSAGE:

NEW JERSEY STATE POLICE FIREARMS
INVESTIGATION UNIT
FIREARMS APPLICATION

GFICM 16.04 05/19/93

SUBJECT:
NAME ELLMAN, KENNETH
ADDRESS PO BOX 18
CITY NEWTON **STATE** NJ **ZIP** _____
SSNO _____
SBI 557016A **FIU #** 55215
DOB 09/29/51 **SEX** M **HT** 5 07 **WT** ___
HAIR BLN **EYES** ___
SUBJECT STATUS: _ **DATE:** ____
DOC REF. _____
COMMENT _____
APPLICATION:
TYPE PPA PERMIT TO PURCHASE
RENEWAL NO 226437
DATE 08/11/74 **SOURCE** SP0212 FIREARMS UNIT
PROCESS FEE _____ **FINGERPRINTED** ___
CHECK # ____ **DATE** _____
RECORDS SECTION DATE _____
INSPECTION DATE _____
FORWARDING DATE _____
ISSUE AUTHORITY SP0212 FIREARMS UNIT
DISPOSITION DATE 01/13/75
PERMIT/LICENSE #_____ **EXPIRES** _____
APPLICATION STATUS A APPROVED
DATE 01/13/75 **DOC REF.** PPA
COMMENT
NEW APPLICATION STATUS
DATE _____ **DOC REF.** _____
COMMENT _____
MESSAGE:

EXHIBIT E - AFFIDAVIT OF KENNETH ELLMAN
SWORN TO AUGUST 22, 1989

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

People of the State of New York, by Robert Abrams, Attorney-General,
Plaintiff,

- against -

Westchester County S.P.C.C., a Special Not-For-Profit Corporation and Kenneth Ellman, Et. Al.
Defendants.

AUG 22 1989
ANDREW J. SPANO
COUNTY CLERK
COUNTY OF
WESTCHESTER

Index #22360/87

Affidavit of Kenneth Ellman In Response To Order for location of Six Firearms

Assigned To:
Hon. Aldo Nastasi

KENNETH ELLMAN being duly sworn deposes and says:

1. I am a Child Abuse Prosecutor and legal advisor to the Westchester County S.P.C.C., a prosecuting agency of the State of New York (72 NY2d 394, 161 NY 233) and a Special Governmental Function Corporation. Previous to my present position I was the Chief Detective of the Westchester County S.P.C.C.

2. I first received, on August 18, 1989, an Order of the Honorable Aldo Nastasi dated June 27, 1989, consisting of four pages. While the Order contains many errors of law and fact *I submit this affidavit in compliance with the first paragraph of page two of the Order*. I will be submitting other affidavits and motions to the Court in connection with other Orders in the near future.

3. To the best that I can understand the Order it strangely demands that I file an affidavit within ten days of "the name and address of every individual who is in possession of the six

handguns. . . .". The six handguns to which the Order presumably refers (the Order does not identify the handguns by serial number or description) have as the Court and Attorney-General well know, always been in my sole and exclusive possession since October 5, 1984.

4. In fact the record before this Court has never in any manner whatsoever disputed that I am the owner of these handguns and am in possession of them as my personal property.

5. If the Court would have read the Plaintiffs Exhibit #J, the letter from Harvey Kaminsky, Esq. dated June 15, 1988 with the Affidavit of Registration of Firearms dated June 10, 1988 by Kenneth Ellman, and Plaintiffs Exhibit #L, the letter of Kenneth Ellman dated July 20, 1988 with exhibits of the Pistol License of Gerard Cristofano then this instant affidavit would never have been required.

6. The entire proceeding relating to these six handguns has had undisputed documentary evidence that these handguns were always properly noticed to the State Police and always legally possessed. In fact it was the Court which Ordered that Deponent file an additional notice with the State Police and which Defendant complied with (see Plaintiffs Exhibit #J, letter from Harvey Kaminsky, Esq. dated June 15, 1988).

7. It is the position of Deponent that the Attorney-General and the State Police knew at all times that Deponent had complied with the law and have committed a fraud upon this Court in attempting to show otherwise.

8. *Therefore I now comply with the Order of the Court and state that I am in possession of the six handguns as I have always stated I was and that I have not transferred the ownership of these handguns to any other person.*

9. Your deponent exclusively resides in the State of New Jersey at #651, R.D.3, Newton, New Jersey 07860. Deponent does not maintain a residence in the State of New York.

10. All handguns possessed by deponent including the six handguns presumably referred to by the Court are legally possessed in the home of deponent under the laws of the State of New Jersey.

11. The Court makes serious error in not recognizing the ministerial function of the State Police pursuant to section 400 12-c of the Penal Law. The only requirement is that the State Police be given notice of the firearms transactions. The permission or acceptance of the State police is not required. The State Police do not have the authority to refuse any notice given to them pursuant to section 400.00 12-c.

12. Deponent has given notice to the State Police many times of these firearms transactions and has always used his best efforts and acted in good faith to comply with the law.

13. Deponent suggests that the Court has not properly reviewed the papers filed by Plaintiff and Defendants in this matter. The credibility of Robert Molic is clearly in question.

/s/Kenneth Ellman
KENNETH ELLMAN

SWORN TO BEFORE ME THIS 22nd DAY OF AUGUST, 1989

/s/Francine K. Herman

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney-General of the State of New York

Plaintiff-Respondent,

- against -

KENNETH ELLMAN

Defendant-Appellant,

and

WESTCHESTER COUNTY S.P.C.C., a Special Not-For-Profit Corporation, and John and Jane Doe, as Officers and or Directors, et. al.

Affirmation
In Support of Appellant
by
Harvey Kaminsky, Esq.

Docket #91-01275

HARVEY KAMINSKY, an attorney at law duly admitted to practice in the Courts of the State of New York, hereby affirms under penalty of perjury that:

1. I was the attorney of record for the Westchester County S.P.C.C. and Kenneth Ellman from November of 1987, including January and February of 1988 in the above encaptioned matter then being heard in the Supreme Court, Westchester County.

2. On or about January of 1988, I personally spoke with Robert Molic, Esq. Asst. Attorney-General who was representing the Plaintiff in this matter.

3. Mr. Molic discussed with me that the amendment to the Criminal Procedure Law section 2.10 (7-a) will go into effect in February of 1988 and that time was running out to comply with the statutory requirement of licensing for firearms.

4. I informed Mr. Molic that I had discussed this with my clients Westchester County S.P.C.C., its officers and directors, and Kenneth Ellman and that they have stated they have no firearms within the State of New York. Since my clients have stated they have no firearms within the State of New York they are in compliance with the new amendment to the Criminal Procedure Law 2.10 (7-a) and do not require any license pursuant to section 400.00 of the Penal Law. Section 400.00 of the Penal Law and Section 2.10 (7-a) of the Criminal Procedure Law only relate to firearms with the State of New York. At this time the new law was not yet in effect.

5. Subsequent to this conversation a stipulation was signed by myself and Mr. Molic dated March 28, 1988 relating to the registration of certain personally owned firearms of Kenneth Ellman which had previously been moved to his home in New Jersey. It was agreed that "licensing" would not apply to these firearms and that registration would be done to correct any previous recording errors. A copy of this stipulation is attached hereto.

/s/Harvey A. Kaminsky
HARVEY KAMINSKY

DATED: HARTSDALE, NEW YORK

FEBRUARY 14, 1991

STIPULATION TO RESETTLE ORDER,
DATED MARCH 28, 1988

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff,

- against -

WESTCHESTER COUNTY, S.P.C.C., A Not-For-Profit Corporation, and KENNETH ELLMAN and JOHN and JANE DOE, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,

Defendants.

STIPULATION TO RE-SETTLE ORDER

----------x

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto that the last decretal paragraph of the order granting preliminary injunction signed by this Court on February 22, 1988 be amended as follows:

ORDERED that within twenty (20) days of the date of entry of this order, defendant KENNETH ELLMAN shall comply with the registration requirements of §400.00 of the

Penal Law with respect to the following six handguns which were purchased in 1984: . . .
and it is further,

AGREED that the words "licensing and" is hereby deleted.

Dated: Hartsdale, New York
March 28, 1988

/s/Harvey A. Kaminsky
KAMINSKY & RICH
Attorney for Defendant,
Westchester S.P.C.C. and
Kenneth Ellman
111 No. Central Park Avenue
Hartsdale, New York 10530
(914) 682-8180

/s/Robert R. Molic
ROBERT ABRAMS
Attorney General of the State of
New York
Attorney for Plaintiff
120 Broadway
New York, New York 10271
by: Robert Molic,
Assistant Attorney General

LETTER DATED JUNE 15, 1988 FROM HARVEY A. KAMINSKY TO HON. ALDO A. NASTASI, WITH ATTACHMENTS

KAMINSKY & RICH
ATTORNEYS AT LAW
111 NO. CENTRAL PARK AVENUE
HARTSDALE, NEW YORK 10530
(914) 682-8180

HARVEY A. KAMINSKY
WALTER L. RICH

BRONX OFFICE:
944 GERARD AVENUE
BRONX, N.Y. 10458

CARY M. TANZMAN
WILLIAM A. CERBONE
LINDA A. EICHEN
MICHAEL E. BEATRICE
ARTHUR S. DROTZER
OF COUNSEL

June 15, 1988

Hon. Aldo A. Nastasi
Justice of the Supreme Court
Westchester County Courthouse
111 Grove Street
White Plains, New York 10601

Re: People of the State of New York
by Robert Abrams v. Westchester
County S.P.C.C. Index No. 22360/87

Dear Judge Nastasi:

Pursuant to your re-settled order dated June 7, 1988 I am enclosing proof of compliance that the Westchester County S.P.C.C. *has registered* the six weapons enumerated in your order. We are also enclosing the registered mail receipt verifying that it was submitted for registration on June 9, 1988.

Very truly yours,
KAMINSKY & RICH
/s/Harvey A. Kaminsky
Harvey A. Kaminsky

HAK/dmp

cc: Robert R. Molic,
Asst. Atty. General

New York Supreme Court
Appellate Division–Second Department

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff-Respondent,

- against -

WESTCHESTER COUNTY S.P.C.C., a Not-For-Profit Corporation,

Case No.: 93-00851

Defendant,

- and -

KENNETH ELLMAN,

Defendant-Appellant,

- and -

JOHN and JANE DOE, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,

Defendants.

RECORD ON APPEAL

HON. ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Plaintiff-Respondent
120 Broadway
New York, New York 10271
(212) 416-8422

KENNETH ELLMAN
Defendant-Appellant Pro Se
Post Office Box 389
Valhalla, New York 10595
1 (800) 942-9304
Voice Box 20832

- and -

P.O. Box 18
Newton, New Jersey 07860

Westchester County Clerk's Index No. 22360/87

TABLE OF CONTENTS

	Page
Statement Pursuant to CPLR 5531	1
Notice of Appeal	3
Pre-Argument Statement	4
Transcript of Hearing, Decision and Order of the Hon. Aldo A. Nastasi, Dated October 19, 1992, Appealed From, with Notice of Entry	5
Motion and Affidavit of Kenneth Ellman, Sworn to September 28, 1992, Seeking Disqualification of the Honorable Aldo Nastasi	49
Order to Show Cause Why Defendant Ellman Should Not Be Punished for Continued Civil Contempt and for Clarification of his Civil Contempt Sentence, Dated October 5, 1992	58
Affidavit of Robert R. Molic, Esq., for Plaintiff, in Support of Order to Show Cause	64
Exhibit A to Molic Affidavit - Commitment Papers	76
Exhibit B to Molic Affidavit - Computation of Sentence	79
Exhibit C to Molic Affidavit - Decision of the Hon. Aldo A. Nastasi, Dated July 27, 1989	80
Exhibit D to Molic Affidavit - Transcript of Proceedings, Dated February 1, 1991	84

Page

Exhibit E to Molic Affidavit - Transcript of Proceedings, Dated February 5, 1991 109

Exhibit F to Molic Affidavit - Civil Contempt Order, Dated February 5, 1991 157

Exhibit G to Molic Affidavit - Warrant of Arrest for Civil Contempt, Dated February 8, 1991 166

Exhibit H to Molic Affidavit - Orders of the Hon. Aldo A. Nastasi, Dated May 9, 1991 and May 14, 1991 170

Exhibit I to Molic Affidavit - Two Warrants of Arrest, Dated June 7, 1991 177

Exhibit J to Molic Affidavit - Transcript of Proceedings, Dated June 27, 1992 191

Exhibit K to Molic Affidavit - Certification of Peter M. Karic, Evidence Custodian, as to Firearms..... 203

Exhibit L to Molic Affidavit - Verified Complaint, Dated November 16, 1987..... 210

Order to Show Cause for a Judgment Prohibiting the Respondents from Maintaining Custody of the Petitioner and Such Other Relief, Dated October 5, 1992..... 231

Verified Petition of Kenneth Ellman, in Support of Order to Show Cause 233

Exhibit A to Petition - Writ of Habeas Corpus, Dated September 24, 1992, with Exhibits A-G..... 237

Page

Exhibit B to Petition -
Computation of Sentence 328

Exhibit C to Petition -
Excerpt from Transcript of Proceedings, Dated
July 27, 1992 329

Affidavit of Kenneth Ellman, Sworn to October 8,
1992 for Adjournment, Need for Counsel and
Inability to Proceed and for Disqualification of
the Honorable Aldo Nastasi 336

Transcript of Proceedings, Dated October 9, 1992 344

Order to Show Cause for an Order Modifying the
Judgment or Sentence Issued to Kenneth
Ellman, Dated October 16, 1992 384

Verified Petition, in Support of Order to Show
Cause 386

Affidavit of David L. Lewis, for Petitioner, in
Support of Order to Show Cause 390

Exhibit A to Lewis Affidavit -
Order to Show Cause, Dated October 5, 1992
(Reproduced herein at pp. 58-230) 397

Exhibit B to Lewis Affidavit -
Letter, Dated October 7, 1992, from David L.
Lewis to the Hon. Aldo Nastasi 398

Exhibit C to Lewis Affidavit -
Letter, Dated October 8, 1992, from Charles G.
Fiore to the Hon. Aldo A. Nastasi 399

Page

Exhibit D to Lewis Affidavit -
Affidavit of Kenneth Ellman, Sworn to October 8, 1992
(Reproduced herein at pp. 336-343) 401

Exhibit E to Lewis Affidavit -
Judgment and Order of Dissolution 402

Exhibit F to Lewis Affidavit -
Final Order Directing Punishment, Dated February 5, 1991 408

Affirmation of David L. Lewis, for Defendant Kenneth Ellman, Dated October 16, 1992 418

Exhibit A to Lewis Affirmation -
Writ of Habeas Corpus, Dated September 24, 1992
(Reproduced herein at pp. 237-327) 421

Annexed to Lewis Affirmation -
Affidavit of Kenneth Ellman, Sworn to October 19, 1992, in Opposition to Order to Show Cause Returnable October 19, 1992, and for Disqualification of the Honorable Aldo Nastasi 422

Certification Pursuant to CPLR 2105 433

EXCERPTS FROM RECORD ON APPEAL

Statement Pursuant to CPLR 5531

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court
Appellate Division–Second Department

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff-Respondent,

- against -

WESTCHESTER COUNTY S.P.C.C., a Not-For-Profit Corporation,

Defendant,

- and -

KENNETH ELLMAN,

Defendant-Appellant,

- and -

JOHN and JANE DOE, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,

Defendants.

---

1. The index number of the case in the Court below is 22360/87.

2. The full names of the original parties are as above. There have been no changes.

3. The action was commenced in Supreme Court, Westchester County.

4. The action was commenced on or about November 16, 1987, by service of a verified complaint.

5. The nature and object of the action are as follows:

Action for corporate dissolution.

6. This appeal is from an order of the Honorable Aldo A. Nastasi, entered October 20, 1992.

7. The appeal is on a full reproduced record.

8. The order to be reviewed was not rendered after a trial.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff,

-against-

WESTCHESTER COUNTY S.P.C.C., a Not-for-Profit Corporation, and KENNETH ELLMAN and JANE DOE, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,

Defendants.

----------X

INDEX NO. 22360/87

NOTICE OF APPEAL

FILED
NOV 18 1992
ANDREW J. SPANO
COUNTY CLERK
COUNTY OF
WESTCHESTER

Please take notice that defendant Kenneth Ellman hereby appeals to the Appellate Division of the Second Department from an Order of this Court which is undated, and was entered with the clerk on October 20, 1992 in favor of Plaintiff, and from every part thereof.

LEWIS & FIORE
Attorney for Defendant
Kenneth Ellman
Office & P.O. Address:

225 Broadway, Suite 3300
New York, New York 10007

To: Robert Abrams
Attorney General
120 Broadway
New York, New York 10271

Westchester County Clerk
Westchester County Courthouse
111 Grove Street
White Plains, New York 10601

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,	:	INDEX #. 22360/1987
Plaintiff,	:	
-against-	:	**NOTICE OF ENTRY**
WESTCHESTER COUNTY S.P.C.C., a Not-for-Profit Corporation, and KENNETH ELLMAN and JOHN and JANE DOE, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,	:	Justice Assigned Hon. Aldo A. Nastasi
Defendants.	:	

PLEASE TAKE NOTICE that the within is a true copy of an Order which was duly made by Honorable Aldo A. Nastasi, Justice of the Westchester County Supreme Court, on October 20, 1992, and entered in the Westchester County Clerk's Office on October 20, 1992.

Dated: New York, New York
October 26, 1992

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Plaintiff
Charities Bureau
120 Broadway
New York, New York 10271
(212) 416-8422

TO: Lewis & Fiore, Esqs.
Attorneys for Defendant
Kenneth Ellman
225 Broadway
Suite 3300
New York, New York 10007

County Attorney of Westchester County
Attorney for R.W. Davis, as
Warden of Westchester County Penitentiary
148 Martine Avenue
White Plains, New York 10601
Attention: Michael Zeytoonian, Esq.

RM2/frc

SO ORDERED TRANSCRIPT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER PART AAN

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff,

-against-

WESTCHESTER COUNTY S.P.C.C., a Not-For-Profit Corporation, and KENNETH ELLMAN and JOHN and JANE DOE, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,

Defendants.

INDEX NO. 22360/87

PROCEEDINGS

Westchester County Courthouse
111 Grove Street
White Plains, New York
October 19, 1992

BEFORE: HON. ALDO A. NASTASI
Justice of the Supreme Court

APPEARANCES: ROBERT ABRAMS, Office of the Attorney General
Attorney for Plaintiff
120 Broadway 3rd Floor
New York, New York 10271
BY: ROBERT MOLIC, ESQ

LEWIS & FIORE, ESQS.
Attorneys for Defendant (Ellman)
225 Broadway Suite 3300
New York, New York 10007
BY: DANIEL LEWIS, ESQ.

Allan S. Bergman,
Senior Court Reporter

Proceedings

* * *

MR. MOLIC: I want to be clear on this: You don't want a separate order on this, but you will issue a continuing commitment order, is that correct?

THE COURT: I have to ascertain the procedure myself as to what is required in that respect. It's not often that I have to incarcerate people for civil contempt. Once I was presiding in criminal trials I knew the procedure there. But it's been a while since then. I'll have to ascertain what the procedure is. If need be, you'll have to prepare an order for the Court.

MR. MOLIC: Thank you.

* * *

THE COURT: This is the decision and order of this Court as regards to this matter before us today as to what I have resolved. So, we will have to ascertain the mechanics of filing or preparing such papers as needed for further incarceration.

MR. LEWIS: Judge, I can only agree that it's a decision of the Court. This cannot be an order of the Court on the continuing civil commitment.

THE COURT: You don't have to agree, Mr. Lewis.

MR. LEWIS: You just said so we agree.

THE COURT: I beg your pardon. We agree that this is what the Court has just said, not that you agree with that.

MR. LEWIS: This cannot function as an order. That's what I'm – I'm not saying this can function as an order. It's

extremely important to me, at least in terms of the procedural posture of this.

THE COURT: Sure.

* * *

Proceedings

So Ordered:

/s/ Aldo A. Nastasi

ALDO A. NASTASI, JSC

CERTIFIED TO BE A TRUE AND CORRECT TRANSCRIPT OF MINUTES IN THIS CASE.

/s/ Allan S. Bergman

ALLAN S. BERGMAN
Senior Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------X

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff,

Index No. 22360/1987

- against -

WESTCHESTER COUNTY S.P.C.C., a Not-For-Profit Corporation, and KENNETH ELLMAN and John and Jane Doe, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,

Defendants.

----------X

Westchester County Courthouse
111 Grove Street
White Plains, New York 10601
October 9, 1992

BEFORE:

HON. ALDO A. NASTASI,

Justice

APPEARANCES:

ROBERT ABRAMS, ESQ.
Attorney General
Attorney for the People
120 Broadway
New York, New York 10271
BY: SEAN DeLANY, ESQ.
Assistant Attorney General

KENNETH ELLMAN
Defendant Pro Se

ALSO PRESENT:

MICHAEL A. ZEYTOONIAN, ESQ.
Assistant County Attorney

DANIEL T. DAMON
Official Court Reporter

Proceedings

* * *

THE COURT: All right.

MR. DeLANY: And the second matter has to do with something that I believe Mr. Zeytoonian would join me in, and that is the correction of the paperwork necessary to communicate in a formal fashion to the warden what has occurred today.

THE COURT: Yes.

MR. DeLANY: And I specifically refer to the form that is called Sentence and Commitment. You'll find it as Exhibit A to our motion papers here, the third page, the final page of that exhibit. It appears to be that document, your Honor, that's caused the confusion because it checks the box of a definite term of imprisonment for 150 days rather than providing for an indefinite term of imprisonment for the civil contempt portion, and if that form could be re-issued and corrected I believe that Mr. Zeytoonian and his clients would have what they need in order to make the correction.

MR. ELLMAN: Judge, I'd like to be heard on this.

THE COURT: Yes, Mr. Ellman.

MR. ELLMAN: I think it should be clear that if not for the criminal contempt commitment I would be free today, and I would have been freed some weeks ago in the opinion of the Westchester County Penitentiary.

What the Attorney General's Office is seeking here to do is to, in effect, amend and change an order of commitment. Again, I think that's improper to be done without the

defendant having the opportunity to have his attorney appear here and be heard on this.

I just want it clear for the record that I certainly am objecting to any proceedings being taken place without any counsel being here and advising me and having an opportunity to be heard by the Court. And I also think the significance of it should not be taken lightly. In fact, the only reason I am still in custody is because the penitentiary is holding me on a criminal contempt warrant, not on a civil contempt matter, and in the eyes of the penitentiary I have totally served my civil contempt some weeks ago.

THE COURT: Mr. Ellman with all due deference to what you're saying, this form that Mr. DeLany has referred to, which has a number of boxes, and the box that he has reference to says a definite term of imprisonment, which shall have a term of 150 days, was never prepared by the Court, never signed by this Court, as I am aware, that the record is replete with what I've said previously and without my being repetitive, and there is nothing that I have affixed my signature to which would indicate that it was a definite or an indefinite, or any other term. That is the avowed purpose of this Order to Show Cause today, so that whatever procedures or paperwork that the warden necessarily must have in order that he may determine and compute the days of your sentence are before him.

MR. ELLMAN: May I see the document?

THE COURT: You certainly may. You were served with these papers but I'll let you see it again.

MR. ELLMAN: If the Court will understand, I was not given the opportunity to bring any documents to the Court.

THE COURT: All right. Look at the document; the caption of it is Sentence and Commitment.

MR. ELLMAN: And who issued this document, if I may ask the Court?

THE COURT: I have no idea, sir.

MR. DeLANY: Your Honor, if I may apologize for the quality of the copy, but on the slightly better copy we were working off of I believe that's Andrew Spano's, the Clerk's stamp at the bottom of the page, if that helps.

MR. ELLMAN: It is the Court's and the Attorney General's position, just so I can understand, that this is not an order of the Court, this document?

THE COURT: Sir, I don't know what it is. It says Sentence and Commitment at the top. I would think that this was one of the necessary procedures that must be followed when a prisoner is brought into custody and incarcerated, or certainly after sentencing. And there are provisions, as you will note, for various other matters to be marked thereon. Who filled it out, how it was filled out, sir, I am not aware, but so that you clearly understand.

* * *

MR. ELLMAN: Is the Court issuing a new order? That's what I'm trying to understand.

THE COURT: Sir, the Court is not issuing any new order of any kind, it is merely clarifying what it previously said for the benefit of all concerned.

* * *

MR. ZEYTOONIAN: Your Honor, if I may. I'd also like to join in with Mr. DeLany if we could get an understanding from the Court as to whether there would be a document that could serve the purposes of the Department of Correction to clarify this.

THE COURT: If that be needed, sir, immediately, I would say yes. I would ask that you present it to the Court for its signature on Tuesday, which is the next time that the Court will be in session, this being a weekend and Monday being a holiday.

Exhibit A to Molic Affidavit -
Commitment Papers

SUPERIOR COURT COMMITMENT

#111465

Index #22360/87

COUNTY OF WESTCHESTER

TO: WESTCHESTER COUNTY DEPARTMENT OF CORRECTION 9/29/87

The defendant herein *Kenneth Ellman* is remanded to the custody of the Westchester County Department of Correction pending further order of this Court. Bail is set in the amount of $ BOND $ CASH.

YOU ARE, THEREFORE, COMMANDED forthwith to detain the above-named defendant pending further order of this Court or the posting of bail as directed by this Court.

COUNTS: Civil Contempt and Criminal Contempt

Dated at the City of White Plains, New York July 27, 1992

/s/ Aldo A. Nastasi

✓ SUPREME COURT JUSTICE

_ COUNTY JUDGE OF WESTCHESTER COUNTY

Westchester County Court
DISPOSITIONS

NAME Kenneth Ellman INDEX NUMBER 22360/87

PLACE OF CRIME_____ DATE OF CRIME _____

NOTE: Enter complete disposition for above indictment ONLY. A separate sheet *must be made* for each additional indictment.

DATE	DISPOSITION	JUDGE/CLERK
7/27/92	Civil Contempt ←90 Days	/s/ Aldo A. Nastasi D. Lopez SCC
7/27/92	Criminal Contempt 30 Days on 2 Separate Charges (Consecutive Time) For a Total of 150 Days. Remand to Westchester County Jail.	/s/Aldo A. Nastasi

[✓] **SUPREME COURT OF THE STATE OF NEW YORK**

[ ] **COUNTY COURT OF THE STATE OF NEW YORK**

COUNTY **WESTCHESTER**

SENTENCE AND COMMITMENT

THE PEOPLE OF THE STATE OF NEW YORK
VS

Kenneth Ellman

INDEX NO. 22360/87

SUPERIOR COURT INFO NO. _____

DATE July 27, 1992

PRESENT
HONORABLE Aldo A. Nastasi

THE ABOVE-NAMED DEFENDANT HAVING BEEN

[ ] CONVICTED OF THE CRIME OF _____

[ ] FOUND TO BE YOUTHFUL OFFENDER FOR THE CRIMINAL ACT OF _____

UNDER THE ABOVE-DESIGNATED INDICTMENT, IT IS ORDERED, THAT THE SAID DEFENDANT BE AND HEREBY IS SENTENCED TO

[ ] AN INDETERMINATE TERM OF IMPRISONMENT WHICH SHALL HAVE A MAXIMUM TERM OF _____ YEARS AND A MINIMUM TERM OF _____ YEARS.

[ ] AS A SECOND FELONY OFFENDER

[ ] AS A PERSISTENT FELONY OFFENDER

[✓] OTHER (SEE BELOW)*

[✓] A DEFINITE TERM OF IMPRISONMENT WHICH SHALL HAVE A TERM OF 150 Days*

[✓] A FINE OF $1,000.00 DOLLARS

[✓] MANDATORY SURCHARGES $250.00

AND THAT SENTENCE HEREIN SHALL RUN

[ ] CONCURRENTLY WITH [ ] SENTENCE
[ ] CONSECUTIVELY THE [ ] UNDISCHARGED PORTION OF THE TERM OF IMPRISONMENT

IMPOSED ON THE DEFENDANT UNDER THE CONVICTION UPON THE INDICTMENT NUMBERED

[ ] ALSO COVERS _____

[ ] WHEREIN THE DEFENDANT IS IN CUSTODY

[ ] WHEREIN THE DEFENDANT IS NOT IN CUSTODY

AND THAT THE SAID DEFENDANT BE AND HEREBY IS COMMITTED TO THE CUSTODY OF THE

[ ] DEPARTMENT OF CORRECTIONAL SERVICES OF THE STATE OF NEW YORK UNTIL RELEASED IN ACCORDANCE WITH THE LAW, AND

[ ] BEING A MALE PERSON TWENTY-ONE YEARS OLD OR OLDER THE WESTCHESTER COUNTY DEPARTMENT OF PUBLIC SAFETY IS DIRECTED TO DELIVER HIM TO THE DOWNSTATE CORRECTIONAL FACILITY LOCATED AT FISHKILL, NEW YORK.

[ ] BEING A MALE MORE THAN SIXTEEN AND LESS THAN TWENTY-ONE YEARS OLD, THE WESTCHESTER COUNTY DEPARTMENT OF PUBLIC SAFETY IS DIRECTED TO DELIVER HIM TO THE

RECEPTION CENTER LOCATED AT ELMIRA, NEW YORK.

[ ] BEING A FEMALE PERSON, THE WESTCHESTER COUNTY DEPARTMENT OF PUBLIC SAFETY IS DIRECTED TO DELIVER HER TO THE BEDFORD HILLS CORRECTIONAL FACILITY LOCATED AT BEDFORD HILLS, NEW YORK.

[✓] DEPARTMENT OF CORRECTION OF THE COUNTY OF WESTCHESTER UNTIL RELEASED IN ACCORDANCE WITH THE LAW.

[ ] TO THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES: PURSUANT TO SECTION 60.35 OF THE PENAL LAW OF THE STATE OF NEW YORK, A MANDATORY SURCHARGE IN THE AMOUNT OF $_____ HAS BEEN IMPOSED. YOU ARE HEREBY NOTIFIED THAT THE DEFENDANT HAS FAILED TO PAY THE MANDATORY SURCHARGE AS OF THE DATE OF THIS SENTENCE.

REMARKS *Sentenced to 90 Days on Civil Contempt and 60 Days on Criminal Contempt to be served consecutively. (Civil Warrant signed 2/8/91—Criminal Warrant signed 6/7/91)

DEFENDANT'S ADDRESS: /s/ D/O/B

A TRUE EXTRACT FROM THE MINUTES

/s/ Andrew Spano

Westchester County Clerk

Exhibit B to Molic Affidavit -
Computation of Sentence

DEPARTMENT OF CORRECTION
WESTCHESTER COUNTY PENITENTIARY
VALHALLA, N.Y. 10595

#H35 26

COMPUTATION OF SENTENCE

To: Inmate ELLMAN KENNETH W.C.P.# 111465

You have been sentenced to this institution for a definite term. In accordance with Article 24, Section 804 of the Correction Law, State of New York, your sentence has been computed as noted below. However, the law provides that certain reductions of the maximum sentence may be earned for "good conduct" and satisfactory participation in the institutional program. The Department of Correction is not required to release you until the maximum expiration date, as noted, but may release you earlier, as noted, provided your conduct and participation in the institutional program is satisfactory.

	YEAR	MONTH	DAY
Current Term			90 + 60 = 150
Jail Time			3
Sentence less Jail Time			147
Credit for "good conduct"			50
Date Received			7/27/92
Minimum Discharge Date			10/30/92
Maximum Expiration Date			12/18/92

A-113

The provisions of Section 5100.6 of the Rules and Regulations of the State Commission of Correction have been explained to me.

/s/_____

Date Explained: 8/19/92

Officer: /s/ AS #221

Parole Slip Given: _____

Warant Slip Given:_____

Associate Warden

By _____

Records Office

11/85:sas

ARRESTED ON 7-24-92 HELD FOUR DAYS BEFORE BEING BROUGHT TO PEN. YOU OWE ME ONE DAY

Affidavit of Kenneth Ellman, Sworn to October 19, 1992, in Opposition to Order to Show Cause Returnable October 19, 1992, and for Disqualification of the Honorable Aldo Nastasi

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

People of the State of New York by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff,

- against -

WESTCHESTER COUNTY, S.P.C.C., A Special Not-For-Profit Corporation and KENNETH ELLMAN and JANE DOE, as Officers and/or Directors of the WESTCHESTER COUNTY S.P.C.C.,

Defendants.

INDEX NO. 22360/87

AFFIDAVIT IN OPPOSITION BY DEFENDANT TO ORDER TO SHOW CAUSE RETURNABLE FOR 10-19-92 AND FOR DISQUALIFICATION OF HON. ALDO NASTASI

----------x

KENNETH ELLMAN, being duly sworn deposes and says:

1. I am one of the defendants herein and make this affidavit in opposition to plaintiff's motion and in support of my motion for recusal of Justice Nastasi.

2. I have been informed that my prior writ of habeas corpus was re-assigned to the Hon. Aldo Nastasi without knowledge or consent of the Petitioner.

3. In good faith as detailed below, Petitioner asks for the Court to enter an order of disqualification for the Hon. Aldo

A. Nastasi and have plaintiff's motion determined by another Judge.

4. I seek disqualification on many grounds. Initially, it should be clear that if the writ is sustained on grounds alleging lack of jurisdiction or complete absence of all jurisdiction, then the Petitioner may have a cause of action for damages against those parties or persons who under color of law illegally arranged for his incarceration. In effect, the Hon. Aldo Nastasi would have to rule that he acted without jurisdiction and in violation of the rights of the Petitioner. Clearly, such an application should not be addressed to the Judge about whom such allegations have been made.

5. The Hon. Aldo Nastasi has a history of behavior towards the defendant which, at best, would be described as intemperate, but clearly is also prejudicial. This behavior has prevented your Petitioner from receiving an impartial and fair adjudication of issues before the Court. The following are a small example of the conduct of the Court:

a) On July 27, 1992 before the hearing on a remand of Petitioner the Hon. Aldo Nastasi requested and had a private ex parte meeting with Assistant Attorney Generals Robert Molic and Sean Delaney. Such meeting was held in the chambers of Judge Nastasi, while Petitioner waited in handcuffs in the courthouse. This private meeting was in violation of Canon 3 A.(4) of the Code of Judicial Conduct.

b) On July 27, 1992, during the hearing for remand of Petitioner, the Hon. Aldo Nastasi denied Petitioner the right to make applications or legal arguments to the Court. At the time of such denial of the sacred and fundamental right of a party to be heard before a Court, Judge Nastasi permitted the opposing party to freely make comments and applications, including an application for remand of petitioner. On page 4 of the transcript dated July 27, 1992, the Court states:

> "Mr. Ellman, the Court is not going to hear applications of any kind from you at this time regarding the decision and order of this Court."

The Petitioner was denied even this basic right to respond to the requests of the opposing party wherein the Attorney General sought my remand to the Penitentiary and asked that the Court:

> " . . . should not entertain any attack from Mr. Ellman at this time on the underlying contempt citations." (Page 3 of transcript of July 27, 1992).

While Petitioner wished to be heard on his applications, Petitioner was relegated to making a brief statement to the Court even on such a significant matter of the failure to even serve Petitioner with Judicial Process in the Criminal Contempt allegations. After making a statement that he was never served, the Court ignored Petitioner and proceeded to remand him. At the very least, upon being appraised of the lack of service and the desire of Petitioner to challenge this in the future the Court should have scheduled some hearing to insure proper service and due process of law or release Petitioner. As stated by the Petitioner:

> "The criminal contempt matter I never was served with process of any kind."

The Court acted like Petitioner never even raised the issue. This type of conduct of the Court violated Canon 3 A.(4) of the Code of Judicial Conduct.

(c) During the trial of the contempt of Court matter, Petitioner was denied such a basic right as inspection of the file maintained by the County Clerk. As shown in the affidavit of DLS "Demovsky Lawyer Service," by Dominic

Dellaport dated January 24, 1991 and the letter of Petitioner dated January 17, 1991 the Court deliberately and intentionally denied inspection of the file to Petitioner. (Letter on file with County Clerk, Index No. 22360/87).

(d) The Court has used the proceedings to attack the Governor of the State of New York and has acted intemperately. The Court stated:

> "You are going to hear the litany. The Governor of this State – are you ready for this? The Governor of this State indicated several times over, in the New York Times and other newspapers, and he has castigated the judiciary of this State in that they do not work, as he says they do not work beyond 5 o'clock, they don't work at all." (See page 283, transcript dated 1/3/91).

> "The Governor does not appreciate the efforts made by this Court or any other Court in this state, none. The judges in New York City have taken off and have not had vacations, and he had the audacity, the utter mitigated gall, to say that what do the judges want besides a raise? Ermine coats? I don't want Ermine coats. And I don't want that Governor making any statements with respect to that. THEREFORE YOUR REQUEST IS DENIED." (See page 284, Transcript dated 1/3/91).

The Hon. Aldo Nastasi used the proceeding against your Petitioner as a political platform to attack the Governor of the State of New York in connection with his personal political beliefs.

(e) The Court has used the proceedings to attack federal judges, federal marshals, and the federal judiciary. The Court stated:

> "I am aware what the federal people believe. I will tell you something more. If they send a marshal up here to bring you down to the federal court, I will have the marshal arrested, if there is any interference with your presence here. That's how insistent I am. I have had this experience before and they have an audacity that is beyond all belief. I don't intend to cater to that. (See page 200, Transcript dated 1/3/91).

The above comments in reference to the Governor and federal judiciary, while in the midst of a trial of your Petitioner and on the record of such trial, show both a use of the proceedings as a soapbox for the Court to put forth its personal political views and a contempt for other branches of government including federal authority. The comments were intemperate, digressed from the matter before the Court, and showed that the Court was disturbed at the time the trial was held. Your Petitioner who is an advocate of increasing federal intervention on civil rights and constitutional issues who had spoken out for more legislative and public oversight of the Court's activities found his trial judge sounding off with his opposing political views. This type of on the record activity showed antagonism towards the Petitioner herein and an unbalanced Court.

(f) While the Court was conducting a trial on the allegations against Petitioner and ostensibly seeking the truth and hearing evidence, the Court stated:

> "We are not here to conclude as to what the evidence discloses. We are not here to inquire

whether you violated the law." (See page 470, Transcript dated 1/28/91).

Comments such as these on the record during trial, showed that the Court was not proceeding in a lawful manner seeking to determine what law and evidence and law applied to the allegations against the defendant. A balanced Court would not normally express itself with such terminology and would certainly be sensitive to how such expressions could be misunderstood. However, Judge Nastasi was apparently not aware of how his statements might to interpreted. Was not your Petitioner even when being tried for contempt of court entitled to raise a defense, and to have evidence considered and law decided impartially?

(g) The Court would insult, degrade and intimidate Petitioner when Petitioner would raise issues of law or fact which the Court did not sustain. The Court showed its personal dislike of Petitioner and prejudice towards a party appearing pro se as petitioner was doing. Even though our legal system fully recognizes the right and propriety of a citizen going forward in a court of law pro se, the Hon. Aldo Nastasi has an improper and irresponsible conduct towards the Petitioner. The behavior or the Court is of long standing. As an example when your Petitioner raised a defense of latches the following dialogue took place:

Mr. Ellman: I against raise the procedural objection which I think is very serious and significant, which is laches (sic).

Court: Mr. Ellman, laches you are saying to me?

Mr. Ellman: Judge..

Court: Are you saying laches? Did I hear the word laches? LACHES. Is that what you said?

Mr. Ellman: Yes Judge. (Mr. Ellman continues to try to explain his argument).

Court: All right. Don't give me laches. That's a nice term. When did you read that? Where did you get this theory that you have laches?

Mr. [illegible]n: May I make, or consider a suggestion?

Court: You are making a record. Make all the records you want to make. You have a right to express –

Mr. Ellman: I can't do that –

Court: I want to know where you got laches. Where did you come up with this thought? Where did it develop? Did you read a book over the weekend? (See transcript page 33-36, dated 12/11/89).

The attitude of the Court continued throughout all proceedings concerning Petitioner. No litigant should have to appear before a person in a position of authority who behaves in such a manner, let alone a judicial officer. Clearly, the Court found itself unable to deal in a responsible manner with the case of the Petitioner. The Court could not even consider legal arguments of Petitioner without interjecting its personal animus toward Petitioner. The conduct of the Court violates Canon 3 A.(3) of the Code of Judicial Conduct.

(h) The Court has intentionally and knowingly withheld affidavits of Petitioner that were filed with the Court and attempted to have Petitioner held in contempt for not making such affidavit which the Court already had in its possession. The Court has inexplicably ruled that in order for Petitioner to be found in contempt the "onus" is upon Petitioner to prove

he is innocent of the allegation, not for the person seeking the contempt to prove that it occurred. The Court has prevented Petitioner from having exhibits marked as evidence of Petitioner's innocence during a purported contempt hearing. (See Affidavit of Kenneth Ellman with Exhibits filed with the Court, dated 4/11/91, pages 46-50, under Index No. 22360/87).

(i) The Courts strange behavior knew no limits. On Pages numbered 1049 and 1050 of the Court trial transcript dated January 31, 1991 the following exchange took place in the middle of the defendants testimony. The Court interrupted the defendants testimony and stated:

> "Court-Mr. Ellman, are you familiar with the Articles of Confederation.? Did you ever hear of that?
>
> Mr. Ellman-Of course. The Articles of Confederation?
>
> The Court-Yes
>
> Mr. Ellman-Yes, I am familiar with that.
>
> The Court-Do you remember when they were enacted, what year?
>
> Mr. Ellman-It was some years previous to the Constitution.
>
> The Court-I just want to test your knowledge. I am just asking you, Thank you. Next question. (The entire courtroom is staring at the Judge) (The Court continues)
>
> You may wonder why would I ask that question. We will tell you some other time. Go ahead. I know I kind of tilted you off, but

> why don't we bring you back, to 1991, the last day of the month, I believe already. The rent is due tomorrow. Let's go. I have to earn my day here."

(j) The Courts bizarre and aberrant behavior has infected all aspects of its judgment and these proceedings. On October 9, 1992 the Court denied defendant the right to have an attorney represent him and went ahead and conducted a hearing upon an Order TO SHow Cause brought by the Attorney-General. This occurred in spite of defendants written objection filed with the Court and County Clerk dated October 8, 1992 stating that defendant would not proceed pro se and has requested that his attorney David Lewis Esq. represent him. The court ignored this written objection and on the record objection and further disregarded the letters from David Lewis Esq. confirming such representation and seeking an adjournment. The Court then issued a "verbal" direction to the County Attorney representing the Warden of the Westchester County Penitentiary that Kenneth Ellman is NOT to be released after serving his sentence of contempt. When your defendant requested an order (appealable paper) and was joined in this request by the County Attorney and the Attorney-General the court declined to issue any written order. In fact as of the date of this affidavit, the court has still not issued any such order, thereby denying defendant the ability to appeal.

(k) This refusal to enter an order of judgment and thereby preventing defendant from seeking appellate review is ongoing. Defendant herein brought a Writ of Habeas Corpus which was improperly transferred from the original impartial Judge selected by random assignment to Hon. ALdo Nastasi. Upon the transfer to Hon. Aldo Nastasi the Writ of Habeas Corpus was summarily dismissed, Yet a Judgment was never issued. Counsel for defendant submitted a judgment and still no written order has been issued again leaving defendant

without the ability to appeal. Since the purpose of the Writ of Habeas Corpus was to review the actions of the Hon. Aldo Nastasi and seek relief from his illegal committment his actions in reviewing his own order and then not issuing a judgment on the Writ of Habeas Corpus effectively denied defendant his rights to the Writ of Habeas Corpus. The purpose of the "Great Writ" which was to allow a speedy, independent and impartial review has been defeated.

6. The aforementioned behavior and conduct of the Court is but a small example of prejudicial, intolerant, undignified, discourteous and aberrant actions of the Court which shows that the Court is not impartial and has a personal bias and prejudice against the defendant. Further the court appears to have a personal problem discharging judicial functions.

7. The allegations made by me herein set forth my imprisonment in a manner that was grossly violative of the United States Constitution, the New York State Constitution, the laws and statutes of New York and New Jersey and the United States Code. The Honorable Aldo Nastasi does have a personal interest in the outcome of this matter. Defendant is seeking a finding that the Honorable Aldo Nastasi acted in the clear absence of all jurisdiction in authorizing the imprisonment of defendant. Such a finding would give rise to a cause of action for damages under the United States Code Title 42, Section 1983 and such other statutes that might grant relief to defendant both State and Federal. There is a clear conflict of interest in the Court ruling on such a matter which could personally and professionally affect the financial well being of the Court. The Court should disqualify itself pursuant to Canon 3 of the Code of Judicial Conduct and pursuant to Section 14 of the Judiciary Law.

8. No reasonable person, attorney, jurist or litigant would believe that the Court should continue to hear matters involving the defendant. Even if the court were able to fairly

dispose of this matter no reasonable person or party would believe that a fair or impartial Judge was hearing this matter. The public and private perception of an independent, impartial, fair and balanced Judiciary is more important than the Courts personal desire to maintain control of this case. Whatever decisions are made, they should be made by a Court that is above reproach and has the full confidence of the parties and the public. Only a granting of a disqualification motion can restore confidence in the court. My previous Writ of Habeas Corpus is adopted herein in all respects.

/s/Kenneth Ellman
KENNETH ELLMAN

Sworn TO Before Me this
19th day of October, 1992

/s/
David L. Lewis
Notary Public, State of New York
No. 31-4720653, Qualified in New York County
Commission Expires 1/3/93

If Notary Public is not available then False statements made herein are punishable pursuant to section 210.45 of the Penal Law.

To be Argued by:
KENNETH ELLMAN
(15 Minutes)

New York Supreme Court
Appellate Division–Second Department

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff-Respondent,

- against -

WESTCHESTER COUNTY S.P.C.C., a Not-For-Profit Corporation,

Case No.: 93-00851

Defendant,

- and -

KENNETH ELLMAN,

Defendant-Appellant,

- and -

JOHN and JANE DOE, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,

Defendants.

BRIEF FOR DEFENDANT-APPELLANT

KENNETH ELLMAN
Defendant-Appellant Fro Se
Post Office Box 389
Valhalla, New York 10595
1 (800) 942-9304
Voice Box 20832

- and -

P.O. Box 18
Newton, New Jersey 07860

Westchester County Clerk's Index No. 22360/87

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO CPLR 5531	ii
ISSUES PRESENTED	1
STATEMENT OF FACTS	2
PRELIMINARY STATEMENT	5
ARGUMENT	6
CONCLUSION	22

EXTRACTS FROM BRIEF OF DEFENDANT-APPELLANT KENNETH ELLMAN

ISSUES PRESENTED

1. Appellant is held in civil contempt and imprisoned in clear absence of *in personam*, subject matter, and geographical jurisdiction. The Court and plaintiff are without all jurisdiction.

2. Appellant is held in civil contempt and imprisoned in violation of Article 19 of the Judiciary Law.

3. Appellant is held . . . in violation of the Statutes and Constitution of New York and the United states and the Laws of New Jersey. Appellant is denied due process of law and equal protection.

Preliminary Statement

This is an appeal by a man imprisoned in the Westchester County Penitentiary since July of 1992 for Civil Contempt of the Supreme Court, Westchester County. The alleged authority of the imprisonment is stated to be the provisions of Article 19 of the Judiciary Law. It is clear that if the imprisonment is for Criminal Contempt, that is illegal in that the statute authorizes a maximum sentence of thirty days. So for the purposes of this brief Appellant will address the authority of the Westchester Court to act under the Civil Contempt provisions of the Judiciary law.

This brief is being written by Appellant pro se while being imprisoned in the Penitentiary. Few legal research tools are available and very limited time is allowed for typewriters and legal work. Appellant will try, within the limitations imposed by his keepers, to raise all proper and meritorious arguments as to why Appellant should be set free. Appellant has not had

sufficient opportunity or time to have an attorney assume the duty of preparing this appeal and, in order to avoid a dismissal of appeal for failure to perfect, submits this brief with the record on appeal prepared by a contract printer.

Appellant is charged with no crime nor is it alleged that Appellant violated any law. Appellant is imprisoned by a Supreme Court Judge by authority of a Civil Contempt application.

Appellant has brought an Application for a Stay Pending Appeal returnable for February 16, 1993 and made by Order To Show Cause signed by the Honorable Vincent Pizzuto. Appellant adopts all the arguments in said Stay Application as if more fully set forth herein.

Appellant adopts all of the arguments made in the Court below on behalf of Appellant as if more fully set forth herein, including all the arguments made in the Writ of Habeas Corpus filed on September 24, 1992 (R241 and R300) and the Writs of Prohibition previously brought in this Appellate Court dated October 5, 1992 and October 16, 1992. (R233 and R390, R418 and R419) Appellant is not able to repeat all of the meritorious arguments herein and relies on the Record in the Court below to raise them, including the Contempt hearing of January and February 1991.

Within the limitations of imprisonment of Appellant this brief is submitted.

* * *

Appellant must be released from imprisonment and the Order of Civil Contempt reversed for the aforesaid reasons and:

a. Lack of Subject Matter Jurisdiction;

b. Lack of Geographical Jurisdiction;

c. Lack of In Personam Jurisdiction;

d. Violation of due process of law and equal protection and violation of Fourteenth Amendment;

e. Violation of double jeopardy;

f. Illegal confiscation and infringement of private and personal property without just compensation;

h. Illegal search and seizure;

i. Arrest of Appellant without probable cause;

j. Prosecution for acts outside of the geographical jurisdiction of the Court, and Plaintiff in violation of Sixth Amendment;

k. Violation of the Privileges and Immunities Clause and the Right to Travel from State to State under Article Four, Section Two of the United States Constitution; and the Commerce Clause Article One, Section 8;

l. That the Order of the transcript of October 19, 1992 does not constitute an order within the meaning of section 774 of the Judiciary Law;

m. The Court failed to make a determination that the Appellant is in continuing contempt and failed to hold any hearing, take any testimony or make any determinations as required by law;

o. That the Appellant is being held imprisoned without any act for Appellant to do or to which an imprisoned man can do;

p. No forfeiture or replevin or confiscation action was ever commenced against Appellant, nor has there ever been any determination by any Court that Appellant is in possession of any property belonging to another;

q. There is no pending proceeding or underlying proceeding as required by section 753 of the Judiciary Law;

r. Appellant has been imprisoned for Civil Contempt when Civil Contempt is only a remedy which can only exist to serve a clear right. Just as there is no right without a remedy, there is and can be no remedy without a right.

s. The civil contempt is no longer coercive, it has become punishment in violation of due process.

CONCLUSION

The Order of Civil Contempt should be reversed. Appellant should be freed and sent home to his family

Respectfully Submitted,

Kenneth Ellman

February 16, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENNETH ELLMAN as Applicant for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254	Petitioner's Affidavit in Support of Application for Writ of Habeas Corpus
against	93 Civ 2164
Warden R.E. Davis, Westchester County Penitentiary and any other person having custody of Kenneth Ellman	

KENNETH ELLMAN, being duly sworn deposes and says:

1. I make this statement in further support for my Writ of Habeas Corpus and to give the District Court sufficient information and to assist such Court.

2. I am a civil prisoner in the Westchester County Penitentiary, Grasslands Road, Post Office Box 389, Valhalla, New York 10595.

3. I annex this affidavit to the form #A0241, Petition under 28 U.S.C. 2254 for a Writ of Habeas Corpus by a person in State Custody.

4. Petitioner is a former domicile of the State of New York, having moved to the State of New Jersey, Sussex County, in October of 1987. **After** Petitioner had become domiciled in his New Jersey home, the State of New York determined that it's Criminal Procedure Law Section 2.10 (7) should be amended to create a new section 2.10 (7-a) relating to firearms possession by Peace Officers of the Society for the

Prevention of Cruelty to Children. This new section of law became effective on November 1, 1987 and for existing Peace Officers on February 1, 1988. At the time the new law came into existence, Petitioner no longer lived in the State of New York and did not carry or possess any firearms in the State of New York. The legally possessed and personally owned firearms property of Petitioner was moved to his long time vacation home in Sussex County, New Jersey, along with Petitioner's other property.

The firearms possessed by Petitioner in New York were legally possessed at all times and when Petitioner moved his personally owned firearms to New Jersey before November 1, 1987, he was in compliance with New Jersey law. The record in the New York Court is clear:

(a) No replevin or forfeiture action was ever brought against the personally owned firearms property of Petitioner;

(b) The personally owned firearms property of Petitioner is not claimed to be owned by another, nor is Petitioner alleged to be in possession of property owned by another;

(c) There is no criminal prosecution of deponent for violation of any firearms laws;

(d) That deponent is not a domicile of the State of New York and is exclusively domiciled in the State of New Jersey since 1987;

(e) That Petitioner has no firearms in the State of New York nor does he bring any firearms into the State of New York;

(f) That the State of New York believes it can enforce a perceived authority of section 2.10 7-a of the New York Criminal Procedure Law, ex post facto, against a non-domiciliary;

(g) That the State of New York believes the purported authority of section 2.10 7-a of the New York Criminal Procedure Law follows deponent out of the State of New York, even though such law was enacted after deponent was domiciled in New Jersey.

(h) That there is no pending proceeding in any New York Court relating to this purported Civil Contempt;

(i) That the underlying proceeding of a corporate dissolution pursuant to the New York Not-For-Profit Corporation Law against the Westchester County S.P.C.C., was ended by Final Judgment dated July 29, 1991;

(j) That the interlocutory orders holding Petitioner in Civil Contempt perished and no longer exist when the Final Judgment was entered;

(k) The underlying Final Judgment of Corporate Dissolution does not contain any relief relating to or affecting the personal firearms property of Petitioner or section 2.10 7-a of the New York Criminal Procedure Law.

5. I was initially arrested by the New York City Sheriff, in the county of Bronx on July 24, 1992. I was kept chained to a hospital bed until July 27, 1992 when I was brought before the Honorable Aldo Nastasi, J.S.C., Westchester County Supreme Court, 111 Grove Street, White Plains, N.Y. 10601.

6. At the time I was brought before the Westchester Court I was informed I was being imprisoned pursuant to Orders of Civil Contempt and Criminal Contempt pursuant to Article 19 of the Judiciary Law of New York.

7. The Order commanding my arrest and imprisonment, with the ordered "sentence" are dated February 8, 1991 for Civil Contempt with a term of ninety days, and June 7, 1991 for two thirty day sentences for Criminal Contempt, all under Article 19 of the New York Judiciary Law. I attach these two orders hereto as Exhibit A.

SEQUENCE OF STATE JUDICIAL PROCEEDINGS

8. On February 5, 1991, the Westchester County Supreme Court, Honorable Aldo Nastasi issued an Order that Petitioner/Defendant is in Civil Contempt of court for violation of an Order of that same Court entered on July 31, 1989. Attached hereto as Exhibit B is a copy of the Order of February 5, 1991 and July 31, 1989.

9. On September 5, 1991, the New York Appellate Division, Second Department dismissed the fully perfected appeals of Petitioner/Defendant. Said dismissal was upon the grounds the Petitioner/Defendant was a fugitive from justice and is unavailable. However, Petitioner was never a fugitive from justice and in fact had perfected his appeal pro se. The domicile and whereabouts of Petitioner were known to the Court at all times. Attached hereto as Exhibit C is the Order dated September 5, 1991.

10. On December 23, 1991 the Court of Appeals of the State of New York dismissed the Motion for Permission to Appeal to the court of Appeals upon the ground that the Order of the Appellate Division is not a final Order. The Order of the Court of Appeals is attached hereto as Exhibit D.

11. A Motion to Reargue the Decision of the Court of Appeals was made to said Court on January 22, 1992 and said motion was again dismissed, on April 2, 1992. (Attached as part of Exhibit D).

12. At that point the Petitioner had exhausted all of his direct appeals in the New York Courts.

13. All appeals in the New York Courts were timely made and complied with the New York Civil Practice Law and Rules.

14. On September 24, 1992 Petitioner filed a Writ of Habeas Corpus with the Supreme Court, Westchester County. Said Writ was given by random assignment to the Honorable Francis A. Nicolai. At the request of the Honorable Aldo Nastasi the Writ was transferred to him and then proceeded to review his own commitment. On September 28, 1992 Judge Nastasi dismissed the Writ without holding any hearing or issuing any opinion. Said dismissal was on the record of the Court, from the bench. However, Judge Nastasi refused to issue any Appealable paper, or disqualify himself based upon Petitioners recusal application.

15. On October 9, 1992, the Honorable Aldo Nastasi held a proceeding wherein he issued a determination from the bench that Petitioner is to be kept imprisoned for Civil Contempt even though Petitioner had already completed his Civil Contempt sentence. Petitioner objected to the proceedings, sought disqualification of Judge Nastasi, and applied for an adjournment so that he could have an attorney. The Court refused to adjourn the proceedings and verbally instructed the Westchester County Penitentiary to keep Petitioner imprisoned. The Court to this date never issued any appealable paper authorizing this continuing imprisonment. The Court never allowed Petitioner to have an attorney during that proceeding.

16. On October 5, 1992 Petitioner brought a Writ of Prohibition in the Appellate Division, Second Department, raising all of the issues brought in the Writ of Habeas Corpus. Said Writ of Prohibition was returnable for October 13, 1992. The Writ of Prohibition was served upon Honorable Aldo Nastasi before his October 9, 1992 proceeding.

17. Said Writ of Prohibition sought an Order that Respondents be prohibited from maintaining custody of the Petitioner, or otherwise commencing or continuing any proceedings against the Petitioner in the nature of a Criminal Contempt Proceeding.

18. On October 16, 1992 Petitioner brought a Writ of Prohibition seeking an Order prohibiting Respondents from issuing or enforcing any Order modifying the judgment or sentence issued to Kenneth Ellman for Civil Contempt or making any Order effecting the good time credits issued to Kenneth Ellman. Said motion was returnable for October 22, 1992.

19. On October 19, 1992 the Honorable Aldo Nastasi of the Westchester County Supreme Court conducted a proceeding pursuant to motion of the Attorney General in which he Ordered on the transcript/record of the Court that Petitioner be kept imprisoned for Civil Contempt. No testimony was offered during this proceeding. Judge Nastasi refused to issue any Order of Commitment, just as he refused to issue any Order on the October 9, 1992 proceeding.

20. On December 7, 1992, the Appellate Division, Second Department issued an Order dismissing the two aforementioned Writs of Prohibition upon the grounds that the relief requested by Petitioner (his freedom) could be safeguarded through alternative remedies. Attached hereto as Exhibit E is the Order of the Appellate Division, Second Department dated December 7, 1992.

21. On January 11, 1993 Petitioner appealed the denial of the Writ of Prohibitions to the Court of Appeals of the State of New York returnable for January 25, 1993. The Court of Appeals dismissed Petitioner's Motion for permission to Appeal on March 25, 1993, Exhibit M. However, as shown in Exhibit D, the Court of Appeals has declined to hear an appeal of Civil Contempt, in this matter.

22. On January 14, 1993, the Westchester Supreme Court, Honorable Aldo Nastasi, issued an Order of commitment attached hereto as Exhibit F. At this time the Court provided to the Petitioner a second order dated January 13, 1993, dismissing the Writ of Habeas Corpus dated September 24, 1992, attached hereto as Exhibit G. The issues raised in this Writ of Habeas Corpus were already appealed to the Appellate Division, Second Department and the Court of Appeals, since the trial Court had previously refused to issue any appealable paper, and the Writ of Prohibition was an accepted procedure for terminating illegal contempt commitments.

23. On November 18, 1992, Petitioner appealed the "Order" of the Honorable Aldo Nastasi that Petitioner is to be imprisoned, which is the transcript of proceedings dated October 19, 1992 and "So Ordered" by the Honorable Aldo Nastasi. Said Order with Notice of Entry of the Attorney General dated October 26, 1992 was an authority for the continuing imprisonment of Petitioner.

24. Petitioner applied for a stay pending appeal of the October 19, 1992 transcript on February 5, 1993, returnable for February 16, 1993. Petitioner further perfected his appeal to the Appellate Division, Second Department and filed a Brief and Record on February 16, 1993.

25. On March 2, 1993, the Appellate Division, Second Department issued an Order denying the Stay Pending Appeal

and further on the Court's own motion dismissing the appeal on the grounds that the "purported" order of imprisonment is merely a decision and not an order and so cannot be appealed. The Order of the Appellate Division, Second Department dated March 2, 1993 is attached hereto as Exhibit H, along with the Notice of Entry of the Attorney General dated October 26, 1992, and the "So Ordered" transcript of proceedings of October 19, 1992.

Upon the dismissal of this Appeal of the imprisonment of Petitioner, it is futile for Petitioner to pursue any further remedies in the State Court.

EXHAUSTION OF STATE REMEDIES

26. Petitioner exhausted his State remedies when the Court of Appeals determined that Civil Contempt was not appealable by its Order dated December 23, 1991 (Exhibit D).

27. However Petitioner believing that his arguments were clear and plainly correct pursued collateral remedies and even an additional Appellate remedy, all to no avail.

28. All of the argument of Petitioner has been fairly presented to the State of New York. The State has been afforded at least one opportunity to determine all the issues and Petitioner believes the State has been given more than one opportunity.

29. In summary the State of New York has first dismissed the regularly perfected appeals of the Petitioner which were in full compliance with State procedural rules. Then dismissed the collateral relief upon the grounds that Petitioner has an Appellate remedy. And then dismissed an additional properly perfected appeal upon the grounds that no Order was issued authorizing the imprisonment of Petitioner, yet all the time leaving Petitioner imprisoned. This circle of denial of

access to the Courts must be ended by Federal intervention. The life and liberty interests of a citizen with his family and loved ones is too valuable to be a pawn and toy of Judicial insensitivity and disregard. Petitioner should not remain imprisoned any longer in violation of the Constitution of the United States.

PRELIMINARY STATEMENT

The aid of the Federal Court is being sought because the State of New York has totally, grossly and plainly refused to address the violations of the United States Constitution manifestly evident in the unlawful imprisonment of Petitioner.

The State of New York has additionally denied Petitioner the benefits and protection of its laws regarding Civil Imprisonment and the right to appeal and thereby denied Petitioner equal protection of the laws and due process. No other former domiciliary of the State of New York has ever been subjected to the Civil Imprisonment as has Petitioner and upon such allegations as are used to justify imprisonment, in this instant case.

The facts of what Petitioner had done or not done are unquestioned. In brief, Petitioner legally possessed personally owned firearms in the State of New York until October of 1987, when he moved out of his home in the State of New York and became a permanent domiciliary of the State of New Jersey. Years later in 1991, Petitioner was found in Civil Contempt and then imprisoned for not complying with New York's alleged firearms licensing laws that were enacted after Petitioner had moved out of the State of New York. No allegations of any illegal firearms possession or use has ever been made against Petitioner and no replevin or forfeiture action has ever been brought against the personally owned firearms property of Petitioner.

Kenneth Ellman worked for over thirteen years as a Peace Officer of the Westchester County S.P.C.C., a duly chartered Society for the Prevention of Cruelty to Children. Deponent represented the S.P.C.C. (as Prosecutorial Agent of the State of New York) in over one hundred child abuse Petitions filed pursuant to Article Ten of the New York Family Court Act. During the course of deponents work, many hundreds of children were protected from abuse and neglect, as the law authorized and required the S.P.C.C. to do. The duties of Petitioner involved arresting persons who committed crimes against children, and in discharging related law enforcement responsibilities of a Peace Officer generally. The work of the Westchester County S.P.C.C. is more fully set forth by the New York Court of Appeals in the Matter of Sharon B. 72 N.Y.2d 394 and in the New York Appellate Division in the matter of Diane P., 110 A.D. 2d 354.

As required by New York State Law, Petitioner completed certifications in law enforcement from the Bureau of Municipal Police, including the Basic Course for Police Officers and the Criminal Investigators School of the New York City Police Department. It is not necessary herein to discuss the extensive law enforcement services provided by deponent and the Westchester County S.P.C.C. and its Officials. The facts of such work cannot be disputed by the extensive judicial proceedings commenced by the Westchester County S.P.C.C. and its Officers on behalf of victims and children.

In 1987, deponent completed a long planned move of his entire family and property, including any remaining personally owned firearms property from his former home in Yonkers, New York to his vacation home of 25 years in Sussex County, New Jersey. Upon doing so, Petitioner became a sole and permanent domiciliary of Sussex County New Jersey in October of 1987. Deponents home is over forty

acres of prime recreation land, with facilities for horseback riding, swimming pools and ponds, hiking, camping, hunting, outdoor photography, scuba diving, fishing, target range shooting and other outdoor activities. Deponent has enjoyed target shooting with his family and friends, in addition to all these other recreational activities. Petitioner has held and still holds a valid New Jersey Firearms Purchaser Identification Card, and a permit to purchase handguns issued in 1975. Deponent received firearms training from the Federal Bureau of Investigation at Camp Smith, N.Y. and additional training from the Smith and Wesson Academy and other organizations.

Deponent has possessed firearms since 1973 and has never been charged in any Court with misuse of a firearm, or any violation of law in connection with firearms. There has never been a forfeiture or replevin action against deponents personally owned and possessed firearms property. At the time the Westchester Supreme Court found Petitioner to be in Civil Contempt, deponent was no longer a Peace Officer and no longer a resident of the State of New York. This being so, Section 2.10 7-a of the New York Criminal Procedure Law could not be complied with or have any effect on the Petitioner.

Deponent, a father of four children, moved to the State of New Jersey before the commencement of the underlying proceedings for corporate dissolution. The imprisonment can not be justified by section 2.10 7-a of the New York Criminal Procedure Law which required deponent to do nothing, for a corporation that no longer exists, under the guise of a corporate dissolution proceeding that no longer exists and had not existed for years.

The interlocutory Orders upon which the Civil Contempt is justified and based, (dated July 27, 1989 and February 5, 1991) did not survive the final judgment of the New York

action rendered by Order dated July 29, 1991. This is further complicated in that the New York Court changed the Order of Commitment after deponent had already completed the term of imprisonment. The New York Court decided it wanted to keep deponent imprisoned for a longer period of time. At the time the New York Supreme Court, Westchester County held a proceeding on October 9, 1992, it changed the already completed sentence of deponent, and never issued any Order authorizing such change or appealable paper. The New York Court clearly had no jurisdiction whatsoever over Petitioner as it had no pending civil proceeding in which to impose any remedy to secure a right. The New York Court would not adjourn the October 9, proceeding to allow Petitioner to have an attorney represent him. On October 19, 1992, the Westchester Supreme Court again "told" the Warden of the Westchester County Penitentiary to keep deponent imprisoned. Again the Westchester Court refused to issue any appealable paper or order. When Petitioner sought to appeal the imprisonment and purported finding of continuing civil contempt under section 774 of the New York Judiciary Law and obtain a stay pending appeal it was denied. The Supreme Court, Appellate Division, Second Department, determined that the Westchester Court never issued an order and called it the "purported order" and therefore deponent cannot appeal his imprisonment. (see Order of the Appellate Division, Second Department dated March 2, 1993, herein as Exhibit H). The intrusion and injury to the family of deponent is gross and incalculable. The family of Petitioner, his four children, including an elderly mother who suffers from heart disease, his friends, his work and those who need him have all been put in jeopardy. All to satisfy a perverse desire by the New York Attorney General to pursue Petitioner and enforce a purported contempt without a right or pending proceeding. The Attorney General seeks to enforce New York Law in the State of New Jersey upon a New Jersey domiciliary who left New York before the law to be enforced existed. Petitioner

does not believe that New York's law follows him wherever he moves, particularly if such law was first enacted after deponent was domiciled in another state. It cannot seriously be put forth that Petitioner did anything wrong pertaining to ownership, possession or use of firearms. The record is totally devoid of any fact finding against deponent personally.

Imprisonment for civil contempt was *never* authorized to exist on its own as a penalty. In fact it may never be a penalty or punishment. Civil Contempt can only be used to vindicate a clear right in a pending proceeding or to enforce a right gained by judgment, where such right has been clearly established. The State of New York has no right to enforce section 2.10 7-a of the New York Criminal Procedure Law or the New York Penal Law in the State of New Jersey. New York has no right or authority to seek imposition of a liability of New York domiciliaries upon New Jersey domiciliaries. Deponent has a right to be left alone in New Jersey to lead his life in peace with those who care for him and those he cares for. The fixation of the New York Attorney General with using a civil proceeding as a substitute for non-existent criminal allegations is nothing more than a denial of Petitioner's right to be charged with a crime or set free. Civil Contempt was never meant to be used in such a manner. To allow Civil Contempt to be an enforcement mechanism for pretended violations of a Penal Law is a devise to destroy the rights of citizens under the United States Constitution.

The basic struggle of the rights of the individual to stand up against oppressive governmental intrusion, which in this case, if taken to its logical conclusion, the lengthy and indeterminate incarceration of Petitioner without any allegation of criminal conduct and *with no pending civil or criminal proceeding in which he can exonerate himself and seek freedom*, is a significant affront to the Constitution of the United States. The use of Civil Contempt as it has been used

in this case, threatens the entire foundation upon which the contempt laws are based. A remedy, a power, is not a right. The question is not whether a court has the power to imprison for a civil contempt, but whether such a drastic remedy can be used without a right. Unlike Criminal Contempt, Civil Contempt is a remedy, only. There is no right herein to imprison Petitioner. The remedy cannot exist alone. To injure a man's life, his children, family and those who depend upon him, by such imprisonment and in such a manner as herein, should not be permitted. The Civil Contempt power was not designed to allow a State to enforce its Penal Laws and fabricate jurisdiction, under the guise of contempt. Civil Contempt is not intended to allow the imprisonment of a man by the contempt power, because there is no law violated or law which allows for such an injustice.

SUMMARY OF FACTS

Deponent moved out of the State of New York on or about October of 1987. Before deponent moved and became an exclusive domiciliary of the State of New Jersey in 1987, he possessed personally owned firearms in his former home in New York. Such firearms were possessed legally and in full compliance with New York law. NO prosecution was ever commenced against Petitioner for violation of any New York Firearms Law. No civil prosecution in the nature of forfeiture or replevin was ever commenced against Petitioner for his personally owned firearms property.

Subsequent to deponent moving to Sussex County, New Jersey, the New York Attorney General commenced a civil corporate dissolution action under the New York Not for Profit Corporation Law against the Westchester County S.P.C.C. a special Not for Profit Corporation.

Subsequent to Petitioner having moved to his New Jersey domicile, the State of New York amended it's Criminal

Procedure Law, section 2.10 (7) to create a new section 2.10 (7-a). This amendment deleted a previous exemption from firearms licensing for Peace Officers of the aforementioned special corporation. At the time this law became effective in November of 1987 and in February of 1988 (for previously appointed Peace Officers) Petitioner had already moved to his New Jersey vacation home of twenty five years and was a permanent domiciliary of Sussex County, New Jersey.

On July 27, 1989 the New York Court at the request of the New York Attorney General, issued an Order that all officials of the aforementioned special corporation comply with the new amendment to the Criminal Procedure Law section 2.10 7-a. Such officials if they possessed firearms in the State of New York would have had to obtain a license for such firearms. Petitioner at the time of this July 27, 1989 order did not reside in the State of New York, carried no firearms in the State of New York, and was an exclusive domiciliary of Sussex County, New Jersey. Since Petitioner was an exclusive domiciliary of Sussex County, New Jersey deponent was not even a Peace Officer of the State of New York. This order dated July 27, 1989, as regards it's commandment to comply with section 2.10 7-a of the New York Criminal Procedure Law, for all of the then defendants, did not effect or relate to Petitioner in any respect. As aforementioned, Petitioner was domiciled in New Jersey and carried no firearms in New York. Years later, in January and February of 1991, the New York Court held a "hearing" in which it was determined that Petitioner was somehow in violation of the July 27, 1989 Order (entered on July 31, 1989). This determination of the New York Court was based upon the fact that deponent was still in possession of his personally owned and legally possessed firearms property in his home in New Jersey. There is no dispute that Petitioner in fact, was domiciled in Sussex County, New Jersey and lived there with all his family and personal property, including his

firearms property. The New York Court found that such ownership of personal firearms possessed under the laws of New Jersey was a violation of the New York Criminal Procedure Law section 2.10 7-a and so a violation of the Order of the Court dated July 27,1989. During the proceeding in which the New York Court made this decision it stated that such July 27, 1989 order:

> "meant that any weapons presently possessed within the State of New York's confines were to be returned to the Court or turned over rather to the New York State Police" (Tr. 1/3/91, page 10).

The New York Criminal Procedure Law, section 2.10 7-a, is merely a definitional statute and does not command any action or impose any penalty. Yet, the New York Court, moments later, changed its mind and issued a new interpretation of its order that Section 2.10 7-a of the Criminal Procedure Law did in fact relate to the personally owned firearms property of Petitioner. The authority for this belief is that somehow because the firearms were once possessed and or purchased in New York, that New York's new law now follows Petitioner into New Jersey, in effect ex post facto.

Based upon this new interpretation the Court then held proceedings, took testimony and determined that its Order was violated. During the proceedings in January and February of 1991 before the Honorable Aldo Nastasi the unrefuted testimony of deponent clearly showed that the personally owned firearms property of Petitioner was lawfully possessed in his home in New Jersey and not brought into the State of New York. In fact, Petitioner had not lived in New York for years. The Court further ordered that a personally owned firearm, purchased in New Jersey, under New Jersey Pistol License, and never brought into New York was also now subject to the ubiquitous 2.10 7-a.

As previously stated such section of law was not enacted until after deponent was already domiciled in the State of New Jersey. Petitioner made extensive arguments to the Westchester Court as to why he could not be held in Contempt, including arguments of conflict of law, Constitutional violations, and lack of subject matter jurisdiction. After making these arguments on February 1, 1991 (attached hereto as Exhibit I), the Westchester Court then issued a new Order dated February 5, 1992 (attached hereto as Exhibit B). This new February 5, 1991 Order now commanded deponent to give his personally owned firearms property to a representative of the New York Attorney General who would meet deponent in the State of New Jersey in order to effectuate compliance with the again ubiquitous section 2.10 7-a. New Jersey Law sections 2C:39-ld, 2C:58-3a and 2C:39-9d all impose serious criminal penalties for the giving away of firearms property to a non-domiciliary, unlicensed, individual. Petitioner declined to commit these crimes and declined to participate in the illegal extension of the New York Penal Law to New Jersey domiciliaries. At no time had the New York authorities brought any forfeiture or replevin action against Petitioner for his personally owned and possessed firearms property. At no time was it alleged that Petitioner was in possession of property owned by another. Petitioner utilized the New York Appellate process to overturn this assertion of New York authority over New Jersey domiciliaries. However, the New York Appellate Court dismissed the perfected appeal and briefs of Petitioner because Petitioner continued to reside in his New Jersey home, beyond the geographical jurisdiction of the New York Court. Somehow the New York Court determined that since Petitioner's well known and disclosed domicile in Sussex County, New Jersey was beyond the New York Courts authority, that made deponent a fugitive and not entitled to appeal.

Petitioner appealed to the New York Court of Appeals and said Court denied the appeal on the grounds that the Civil Contempt Order was not a final order.

Subsequent to the interlocutory Civil Contempt proceedings the New York Attorney General obtained a summary judgment against the Defendants in the Corporate Dissolution proceeding dated July 29, 1991 and filed with the County Clerk on August 2, 1991, (attached hereto as Exhibit J). This Final Judgment for Corporate Dissolution and other relief was completely and totally silent as regards any of the personally owned firearms property of the Petitioner. At this point the proceedings (except for appeal) in the Westchester Court were concluded and all interlocutory orders has perished. Interlocutory orders, including those of Civil Contempt, (unlike Criminal Contempt), do not survive Final Judgment. On July 24, 1992, a year after Final Judgment and conclusion of the Corporate Dissolution action, Petitioner was arrested in New York upon the perished interlocutory contempt warrant dated February 8, 1991 and two Criminal Contempt Orders.

The Civil and Criminal Contempt arrest orders all arise from the determination of the Westchester court the deponent did not comply with Criminal Procedure Law 2.10 7-a for his personally owned firearms property in Petitioner's New Jersey domicile.

Petitioner has been imprisoned ever since and is now faced with an inability to obtain any justice on appeal or respect for the rights guaranteed by the United States Constitution. Although Petitioner presented the Constitutional arguments to the Westchester Court, the Court showed no interest in these rights. The Westchester Court apparently is antagonistic to Federal authority and clearly stated on the record:

> "I am aware what the Federal people believe. I will tell you something more. If they send a marshall up here to bring you down to the Federal Court, I will *have the Marshall arrested*, if there is any interference with your presence here. That's how insistent I am. I have had this experience before and they have an audacity that is beyond all belief. I don't intend to cater to that."
> (transcript dated Jan. 11, 1991, Page 200)

At this point Petitioner remains imprisoned in the Penitentiary, subject to repetitive 90 day orders of imprisonment for a Civil proceeding that no longer exists. There was never any trial held in the Westchester Court allowing Petitioner an opportunity to cross-examine witness and present his own witness in the Corporate Dissolution matter. No finding of misconduct or criminal activity has ever been made against Petitioner allowing a Final Judgment to be entered justifying this imprisonment.

FEDERAL CONSTITUTIONAL RIGHTS VIOLATED

Petitioner claims that his imprisonment is in violation of the Constitution of the United States in that:

(a) Prohibition against Ex Post Facto law or application of law effecting imprisonment in an ex post facto manner;

(b) Imprisonment by a Court without subject matter jurisdiction;

(c) Imprisonment by a Court without geographical jurisdiction;

(d) Imprisonment by a Court without In Personam jurisdiction

(e) Imprisonment by a Court without In Rem jurisdiction;

(f) Imprisonment in violation of due process of law, of the Fourteenth Amendment and equal protection;

(g) Imprisonment in violation of the Fourth Amendment;

(h) Violation of Double Jeopardy;

(i) Illegal confiscation and infringement of private and personal property without just compensation, and as an illegal search and seizure;

(j) Arrest and detention of Petitioner without probable cause to believe a violation of law authorizing imprisonment occurred;

(k) Prosecution and imprisonment for acts outside the geographical jurisdiction of the Court in violation of the Sixth Amendment;

(l) Violation of the Privileges and Immunities Clause and the Right to travel with personal property from State to State under Article Four, Section Two of the United States Constitution; and the Commerce Clause; Article One, Section 8;

(m) Lack of all jurisdiction as no order was issued authorizing the imprisonment of Petitioner;

(n) Imprisonment in violation of the Constitutional restrictions of imprisonment for Civil Contempt in that Petitioner is being held without any act for Petitioner to do or to which an imprisoned man can do;

(o) Petitioner has been imprisoned for Civil Contempt when Civil Contempt is only a remedy which can only exist to serve a clear right. Just as there is no right without a remedy, there is and can be no remedy without a clear right.

(p) The Civil Contempt is no longer coercive, it has become punishment (and always was punishment) in violation of due process;

(q) Petitioner is actually innocent and the imprisonment of Petitioner is a gross and fundamental miscarriage of justice;

(r) Petitioner was denied his right to appeal in the Courts of New York; and his right to notice an opportunity to be heard before judgment on February 8, 1991.

(s) That the State Court Judge engaged in ex parte communications and acted in an unbalanced and prejudicial manner and is hostile to Federal Constitutional Rights and Federal authority;

(t) Petitioner is imprisoned by a prejudicial and arbitrary application of State Law;

(u) The Order of the New York Court is in violation of 18 U.S.C. 922;

(v) Denial of right to counsel and effective assistance of counsel.

(w) Violation of prohibition of cruel and unusual punishment of the Eighth Amendment.

(x) Violation of full faith and credit clause.

FEDERAL CONSTITUTIONAL RIGHTS VIOLATED

Ex Post Facto Violation

Section 2.10 7-a of the New York Criminal Procedure Law became effective on November 1, 1987 and did not apply to those previously appointed as Peace Officers until February 1, 1988. Petitioner was a permanent domiciliary of Sussex County, New Jersey in both November of 1987 and February of 1988. At the time New York enacted this new amendment, Petitioner was clearly and plainly not subject to the firearms licensing laws of New York for his personally owned and possessed firearms property in his New Jersey home. The attempt by New York to enforce compliance with its laws upon *former* residents of the State, for laws enacted after they had become permanently domiciled elsewhere is clearly an Ex Post Facto violation. Deponent cannot be held in Civil Contempt and imprisoned because he did not comply with a New York Penal Law which did not exist at the time he was domiciled in New York. The enactment of such a law *after* Petitioner was domiciled in the State of New Jersey does not confer any jurisdiction upon the State of New York.

IMPRISONMENT WITHOUT JURISDICTION

Petitioner is being imprisoned in the clear and complete absence of in personam jurisdiction, subject matter jurisdiction, geographical jurisdiction and In Rem jurisdiction. There can be no Civil Contempt of Petitioner because there is no pending proceeding. The proceedings of Corporate Dissolution ended with the Final Judgment of Dissolution dated July 29, 1991 (Exhibit J). Since New York obtained a Final Judgment and the proceedings ended on July 29, 1991 there are no pending proceedings. All interlocutory orders issued before the Final Judgment perished and ceased to exist.

Petitioner is being held only upon the authority of the civil Contempt interlocutory orders dated July 27, 1989 and February 5, 1991 (Exhibit B). Neither of these orders had continued existence or had any legal effect when Petitioner was arrested on July 24, 1992 nor exist today. The Final Judgment of July 29, 1991 does not incorporate the previous interlocutory orders. Appellant is not presently alleged to be in violation of the Final Judgment and no proceedings have ever been brought against the Appellant for any violation of the Final Judgment of the New York Court.

Civil Contempt is not a punishment and can never be a punishment. Civil Contempt is only for the purpose of protecting the right of a party determined by a Court having jurisdiction in a valid judgment. It is a drastic and dangerous remedy only used to protect a clear right. Civil Contempt unlike Criminal Contempt cannot exist on its own, but is dependent upon the underlying pending proceedings or Final Judgment. Civil Contempt can never be used to vindicate the right or dignity of a Court. While Criminal Contempt can exist even if the underlying proceedings are concluded or dismissed, Civil Contempt cannot. There is no pending proceeding where Petitioner has been sued or had process served against him. There is no in personam jurisdiction to hold and keep deponent in Civil Contempt, since there is no proceeding pending any Court or Final Judgment sought to be enforced. While Criminal Contempt can exist in its own proceedings unrelated to the status of the underlying proceedings, Civil Contempt is nothing more than a *remedy* to secure and protect an established right and to secure compensation for damages to another party. There is no proceeding against petitioner wherein it has been determined that any party has been damaged or injured and there is no compensation to any other party by the imprisonment of Petitioner.

The imprisonment of deponent is nothing more than (a) punishment illegally obtained for an alleged violation of an interlocutory order, (b) in a proceeding that finally ended by Final Judgment and no longer exists, (c) for an alleged right never granted by the Final Judgment in the underlying proceeding; (d) and beyond the jurisdiction of State of New York and its Courts.

Since there is no pending proceeding and no action in which any party can seek a remedy of Civil Contempt to obtain protection and compensation, Petitioner is being imprisoned in the clear absence of In Personam Jurisdiction. Petitioner has not been sued, there is no action or controversy against Petitioner in any Court authorizing this Civil imprisonment. There is no forfeiture or replevin or property confiscation proceeding against deponent. No party has alleged that Petitioner Kenneth Ellman, is in possession of property owned by another.

There is no subject matter jurisdiction over Petitioner by the New York Court or New York Attorney-General. There is no subject matter jurisdiction to hold Petitioner in Civil Contempt. Deponent is being held in Civil Contempt for not complying with New York perished interlocutory orders dated July 27, 1989 and February 5, 1991. New York asserts that these Orders confer authority upon the State to demand Civil Contempt enforcement of section 2.10 7-a of the Criminal Procedure Law upon the personally owned firearms property of a New Jersey domiciliary in his home in New Jersey (your Petitioner). If New York asserted it owned the property, this case would be a simple replevin matter and the controversy settled upon the facts of ownership. However, New York does not assert any ownership. New York plainly and simply asserts jurisdiction to enforce its firearms licensing laws over a New Jersey domiciliary who left New York before the law existed. New York does not have geographical jurisdiction to

enforce such orders, laws or assert such authority upon a New Jersey domiciliary. New York has no such authority anymore than New Jersey would have to enforce its firearms property laws in New York over its former domiciliaries.

This gross, plain and total lack of geographical jurisdiction is also a gross, plain and total lack of subject matter jurisdiction. As stated in Wilkinson Sword, 652 F. Supp. 487, U.S.D.C. N.D. Illinois E.D. (Jan. 26, 1987), Civil Contempt cannot exist without subject matter jurisdiction.

A Court cannot have subject matter jurisdiction to impose Civil Contempt if it does not have authority to enforce the alleged law violated because the alleged violation occurs outside the geographical jurisdiction of the Court.

Petitioner has a right under the United States Constitution to possess his personally owned firearms property, acquired and possessed before the commencement of the New York proceeding, in the privacy of his home in Sussex County, New Jersey. Only the laws of New Jersey and of the United States may determine whether such possession is lawful and only the laws of the State of New Jersey and of the United States may regulate such property. Only the State of New Jersey has In Rem jurisdiction over the personally owned firearms property of Petitioner in his New Jersey home.

Petitioner, Kenneth Ellman, does not possess his personally owned firearms property pursuant to any authority of the Corporate Defendant in the terminated New York Corporate dissolution proceeding (Exhibit J), nor pursuant to any authority of the State of New York. Deponent is not a party to any proceeding wherein his personally owned firearms property are claimed to be owned by another. Nor, has Petitioner been shown to have committed any violation of law causing a forfeiture of his firearms property.

New York has imprisoned Kenneth Ellman in the clear and total absence of all geographical jurisdiction, subject matter jurisdiction, and In Rem jurisdiction.

Petitioner is imprisoned in violation of the Fourth Amendment, and the Fifth Amendment. There is no probable cause to believe that Petitioner has committed any violation of law authorizing the imprisonment of Petitioner. The imprisonment of Petitioner is an illegal seizure of his body to extort him to comply with an illegal seizure of his personally owned firearms property. There is no authority to seize the personally owned firearms property of deponent and there can then be no justification to extort and torture Petitioner to acquiescence in a seizure in violation of the Fourth Amendment. The Fourth Amendment cannot be violated to extend illegitimate jurisdiction to accomplish an unconstitutional property seizure and confiscation without just compensation.

The imprisonment of Petitioner is to accomplish an illegal property confiscation. Civil Contempt cannot be used as a disguised search and seizure warrant to accomplish an illegal search and seizure beyond the geographical jurisdiction of the State of New York and its Attorney-General. It is even more egregious since New York is using this Civil Contempt to enforce a purported authority of its Penal Laws (C.P.L. 2.10 7-a and Penal Law section 400.00). New York would not be entitled to a seizure warrant under the Fourth Amendment and it should not be entitled to imprison deponent civilly to avoid and evade the Constitution of the United States. Civil Contempt cannot be used to obtain consent to an illegal search and seizure and illegal property confiscation without compensation. Civil Contempt cannot be used as a form of medieval torture to obtain consent to a waiver of Constitutional rights and to an illegal search and seizure and illegal property confiscation. There is no right of any party to use the remedy of Civil Contempt to enforce a purported right to violate the United States Constitution.

Appellant is being prosecuted and imprisoned for alleged conduct and allegations outside the geographical jurisdiction of the State of New York, in violation of the Sixth Amendment. The purported order of the New York Court would have caused Petitioner to commit crimes under the laws of New Jersey Statutes 2C:58-3a, 2C:39-1d and 2C:39-9d and the United States Code Title 18, Section 922. Further New York never even conferred any immunity for its own criminal penalties pursuant to section 265.00 of the New York Penal Law. The Order of the Westchester Court dated February 5, 1991 (which New York still demands Petitioner obey), required deponent to again comply with section 2.10 7-a of the New York Criminal Procedure Law. But the Court was now ordering that compliance take place in the State of New Jersey. Such giving away of the personally owned firearms property of deponent to a representative of the New York Attorney-General, in New Jersey would have been a serious crime, under New Jersey law. For Petitioner to have given away his personally owned and possessed firearms property from his home in New Jersey to a non-resident who does not possess a New Jersey license, or to give such property away in another State by bringing such firearms property to New York would also constitute a violation of 18 U.S.C. 922. It is clear that deponent has not been a domicile of New York since 1987, so deponent could not bring any firearms into New York without committing a violation of the New York Penal Law. The criminal violations which would result from the purported Orders of the New York Court are further evidence of the complete and total lack of jurisdiction and over-reaching of New York.

No Court can order a citizen to commit a criminal act without immunity, and the lack of power to grant immunity is conclusive evidence of the lack of jurisdiction of the New York Court to issue the Order or of New York to imprison Petitioner. Whether Petitioner is in illegal possession of

firearms property is a decision for the authorities of the State of New Jersey and for the appropriate Federal authorities, not for New York. New Jersey and the United States have the power to prosecute deponent for any alleged violation of firearms laws, in the State of New Jersey. New York does not.

If New York believes that deponent violated a firearms law in New York, then New York has the power to indict and prosecute deponent. In such a case of a criminal violation, New York could arrest or have deponent arrested anywhere. But, New York does not have any such criminal proceeding or criminal complaint.

New York has no criminal proceedings against deponent for any alleged firearms property violation. New York should not be allowed to imprison persons for Civil Contempt as a subterfuge for its gross lack of jurisdiction.

The Constitution of the United States prohibits each State from attempting to enforce its Penal laws in another State. To allow New York to enforce its Penal Law in New Jersey through the mechanism of Civil Contempt, is to allow persons to be imprisoned without due process of law and in violation of the Fourteenth Amendment. It is also a violation of the crucial and necessary sovereignty of each State over its own citizens, as conferred by the United States Constitution. Acts of a State outside of its own geographical jurisdiction are not acts of a sovereign, but acts in the clear absence of all jurisdiction. The acts of New York are more extraordinary in that they have imprisoned Petitioner upon the authority of a law *enacted after Petitioner was domiciled in New Jersey.*

The Privileges and Immunities clause and the right to travel from State to State are violated. Article Four, Section Two of the United States Constitution protects the rights of citizens to move from State to State and to be governed by the

laws of their State of domicile. The State of New York cannot prevent the personally owned firearms property of Petitioner from being moved out of New York to the new and exclusive domicile of Petitioner in New Jersey. Lawfully possessed firearms property is no different then any other lawfully possessed property. Particularly since the change of domicile of Petitioner took place *before* the purported law sought to be enforced was enacted.

New York has no legally obtained and enforceable Final Judgment of its Court to authorize a remedy to compel a New Jersey domiciliary to do any legal and legitimate act. New York has no pending proceeding in its Courts to which it has obtained an interlocutory judgment for a New Jersey domiciliary to any legal and legitimate act. New York has no authority, except unconstitutional brute power to imprison Petitioner under the *remedy* of Civil Contempt.

Petitioner does not question the authority of New York to use Civil Contempt imprisonment as a drastic remedy to secure a proven right within the limits of the Constitution. Petitioner disputes the use of such a power and remedy without any right in violation of the Constitution of the United States. It is clear that such imprisonment of Petitioner is no longer coercive and is for an unconstitutional punishment. As the New York Court stated on October 19, 1992 on pages 31 and 32 of the transcript for that date:

> "Now, you say that this is a kind of coercive thing. Sir, *I don't know if it's coercive. I don't think it is.*"

Petitioner has been imprisoned since July 24, 1992 without authority of New York Law, in a prejudicial and arbitrary application of New York law, by a Judge who engaged in ex parte communications with the New York Attorney-General and who is hostile to the Federal Constitution and

Federal Authority. Petitioner is being imprisoned in violation of the Constitution of the United States. Petitioner is actually innocent and has done nothing wrong, has hurt no one and is only in possession of property that he has owned for almost twenty years, legally and properly.

Petitioner herein adopt in all respects the attached Memorandum of Law of Gary Needleman, Esq.

Petitioner adopts herein as if more fully set forth herein all of the arguments he made in the New York Courts on his behalf and in particular his Brief on Appeal and his arguments contained in the Record on Appeal attached herein as Exhibit #K marked Case #93-00851 and his arguments presented to the New York State Court of Appeal in his Motion for Permission to Appeal attached herein as Exhibit #L.

WHERETOFORE, I ask the United States District Court to Order my release from imprisonment in the Westchester County Penitentiary as being in violation of the Constitution of the United States; to allow me to be released with or without bail pending a determination of this application and if the Court will not allow the above then to grant release pending further proceedings in the State Court while retained jurisdiction of this application and doing whatever else may be done as justice may require to protect me and to prevent my imprisonment for a purported Civil Contempt when I don't have the ability to purge or comply with the purported Order and when such Order is in violation of the Constitution of the United States.

/s/ Kenneth Ellman
Kenneth Ellman

Dated: March 31, 1993

Sworn to before me this 31 day of March, 1993
/s/William Wright

WILLIAM WRIGHT

NOTARY PUBLIC
Notary Public, State of New York
No. 4996462
Qualified in Westchester County
Commission Expires May 18, 1994

INDEX OF EXHIBITS TO WRIT OF HABEAS CORPUS

Exhibit A - Orders of Contempt of Court dated February 8, 1991 and June 7, 1991 from Westchester County Supreme Court. These Orders mandated arrest and imprisonment for a definite sentence of ninety days for Civil Contempt and two terms of thirty days each for Criminal Contempt. Both Orders are under the authority of Article 19 of the New York Judiciary Law, not the Penal Law. Both Orders are for allegedly not complying with section 2.10 7-a of the New York Criminal Procedure Law. The Civil Contempt Order of February 8, 1991 is an interlocutory Order which perished when Final Judgment wa subsequently issued and were not included as relief in the Final Judgment. No hearing was held or opportunity to be heard before issuance of these Orders.

Exhibit B - Orders of the Westchester County Supreme Court dated July 31, 1989 and February 5, 1991 purportedly ordering and authorizing Petitioner to comply with section 2.10 7-a of the Criminal Procedure Law. The Order of July 31, 1989 is what the entire "Contempt Imprisonment" is based upon. The Order of February 5, 1991 is a finding that Petitioner violated the July 31, 1989 Order, but, amending the 1989 Order and demanding that Section 2.10 7-a be complied with in the State of New Jersey. No hearing was ever held showing any violation of the February 5, 1991 Order, but imprisonment was authorized anyway.

Exhibit C - Order of the Supreme Court, Appellate Division, Second Department dated September 5, 1991 dismissing the fully perfected appeals of Petitioner from Orders of Civil Contempt dated February 8, 1991 and February 5, 1991.

This dismissed appeal was from these two interlocutory Orders which did not survive Final Judgment in the underlying

proceeding. No mention of these Orders or relief was made in the Final Judgment. The fully perfected appeal was dismissed upon the grounds that Petitioner was a fugitive. Petitioner was never a fugitive, perfected his appeal pro se, and continued to reside at his well known and fully disclosed domicile in Sussex County, New Jersey.

Exhibit D - Order of the New York State Court of Appeals dated December 23, 1991, dismissing the motion to appeal the Order of the Appellate Division and the Order of the Westchester County Supreme Court. The Dismissal was upon the grounds that the Order sought to be appealed was not a Final Order. A second Order of the New York State Court of Appeals is also attached here dated April 2, 1992 denying the Petitioner's motion to reargue the aforementioned dismissal.

Exhibit E - The Order of the Supreme Court, Appellate Division, Second Department dated December 7, 1992 dismissing two applications for Writs of Prohibition pursuant to the New York C.P.L.R., Article 78. The grounds of the dismissal are that Petitioner has an alternative (Appellate) remedy. These applications for Writs of Prohibition were to secure the freedom of Petitioner.

Exhibit F - Order of the Supreme Court, Westchester County, dated January 14, 1993 renewing the "purported Order/Transcript of October 19, 1992 and continuing the imprisonment of Petitioner. All these purported Orders are based upon perished interlocutory Orders that no longer exist for a proceeding that no longer exists.

Exhibit G - Order of the Supreme Court, Westchester County, dated January 13, 1993 and disclosed by the Court on January 14, 1993 dismissing the Writ of Habeas Corpus filed on September 24, 1992. The delay in issuance of the Order after the Court fully dismissed the Writ of Habeas Corpus on

September 28, 1992, denied Petitioner the right to appeal and made the Writ useless to Petitioner.

The Writ had already been attached to the Writs of Prohibition and appealed to the Appellate Division and the Court of Appeals, before the issuance of the Order.

Exhibit H - Order of the Supreme Court, Appellate Division, Second Department dated March 2, 1993 dismissing the application for stays pending appeal of the imprisonment Orders and *sua sponte*, dismissing the perfected appeal by Petitioner of the imprisonment Order dated on the transcript of October 19, 1992. The October 19, 1992 "purported" Order (which kept Petitioner imprisoned), the Notice of Entry of the Order dated October 26, 1992, from the State of New York, are attached hereto with the Appellate Division Order. The Petitioner was imprisoned by a Court without jurisdiction, in a proceeding which does not exist, without the issuance of any order and denied the right to appeal. The Honorable Aldo Nastasi of the Westchester Court signed the "purported" Order (the October 19, 1992) transcript on its last page (page 42).

Exhibit I - Transcript of closing arguments of Petitioner to the Westchester Supreme Court in proceeding for Contempt dated February 1, 1991.

Exhibit J - Final Judgment ending the underlying proceedings in the Westchester Supreme Court dated July 29, 1991 and entered in the County Clerk on August 2, 1991. This Final Judgment of corporate dissolution does not contain any relief against the Petitioner in connection with the purported Civil Contempt. All previous interlocutory Orders that are the purported authority for the imprisonment of Petitioner did not survive the Final Judgment. Petitioner is being imprisoned for Civil Contempt by a Court without a proceeding or Final Judgment alleged to be violated.

Exhibit K - The brief and Record of Appeal filed in the Supreme Court, Appellate Division, Second Department under Case Number 93-00851 from the purported Order of imprisonment of Petitioner by transcript dated October 19, 1992. This exhibit was served upon the New York Attorney-General on February 16, 1993.

Exhibit L - Notice of Motion for Leave to Appeal to the New York Court of Appeals dated October 18, 1991 (motion #1222-91) with Motion for Reargument dated 1-22-92.

Exhibit M - Order of the State of New York, Court of Appeals, dated March 25, 1993 denying leave to appeal.

3. The Court further ordered that in the event defendant Kenneth Ellman fails to comply with any of the provisions of the Court's order of February 5, 1991, he is to be "imprisoned in the Westchester County Jail for a period not exceeding 90 days or until discharged according to law," and that the

> Attorney General shall apply to the Court without notice for any and all relief that is appropriate in order to carry into effect the provisions of this order, including a warrant directed to the sheriff of Westchester County or other law enforcement officer of any jurisdiction commanding such officer to arrest defendant Kenneth Ellman and to bring him before the Court.

4. Defendant Kenneth Ellman was personally served with a copy of the Court's order on February 5, 1991, at which time defendant Kenneth Ellman, in open Court and at the Court's direction, examined the copy of the order which he received, compared it with the original signed order of the Court, and acknowledged before the Court that the copy he received was a true and accurate copy of the Court's original order.

5. It has been shown to the Court that defendant Kenneth Ellman (a) failed to appear at the New Jersey State Police, Sussex State Police Station, at 2:00 p.m. on Friday, February 8, 1991 as directed by the contempt order, and (b) failed to turn over to representatives of the New York State Department of Law, who have been identified to the Court as John DeRosa, Director of Investigations, Public Advocacy Division, New York State Attorney General's Office, and Robert Gould, a police officer in the New York State Department of Law, the firearms that are specifically identified in the Court's order, which firearms were to be transported and delivered to the New York State Police at the State Police Barracks in

Hawthorne, New York on February 8, 1991, as directed by the contempt order.

6. You are hereby commanded, as the Sheriff of the County in the State of New York where defendant Kenneth Ellman is found, to arrest defendant Kenneth Ellman forthwith and to take all actions necessary to bring him before this Court to be committed into the custody of the warden of the Westchester County Jail for a period of 90 days.

Dated: White Plains, New York
February 8, 1991

/s/Aldo A. Nastasi

J.S.C.

RM12/bg
WARRANT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,

Plaintiff,

-against-

WESTCHESTER COUNTY S.P.C.C., a Not-For-Profit Corporation, and KENNETH ELLMAN and JOHN and JANE DOE, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,

Defendants.

----------X

Index No. 22360/1987

WARRANT OF ARREST AND COMMITMENT FOR CRIMINAL CONTEMPT

TO: ANY SHERIFF OF ANY COUNTY IN THE STATE OF NEW YORK WHERE DEFENDANT KENNETH ELLMAN IS LOCATED

1. By a decision and order of this Court dated and entered on May 9, 1991 and by an amended decision and order of the Court dated and entered on May 14, 1991, Kenneth Ellman, a defendant in this action by the Attorney General of the State of New York for dissolution of the Westchester County S.P.C.C., a not-for-profit corporation incorporated for the purpose of protecting children from abuse and neglect, and injunctive and related relief against defendants Westchester

County S.P.C.C., Kenneth Ellman, and the officers, directors, agents and peace officers of the Westchester County S.P.C.C., was ordered and adjudged in criminal contempt of court pursuant to Judiciary Law § 750 and CPLR 5104 because of his willful failure since at least January 3, 1991 to comply with the direction in the Court's lawful order entered on July 31, 1989 that Kenneth Ellman turn over to the New York State Police all handguns in his possession which were acquired or possessed by him on the basis of Westchester County S.P.C.C. authority and for which no license was obtained as required by Criminal Procedure Law § 2.10(7-a). Certified copies of the Court's decision and order of May 9, 1991 and amended decision and order of May 14, 1991 are attached as Exhibit A.

2. Defendant Kenneth Ellman was sentenced pursuant to Judiciary Law § 751(1) to pay a fine of $1000.00 and to a term of imprisonment of 30 days to be served consecutively with the terms of imprisonment of (a) 90 days that was previously imposed by the Court for his civil contempt of Court, and (b) 30 days that was imposed by the Court for the criminal contempt subsequently committed by defendant Kenneth Ellman for his willful failure to comply with the Court's lawful decision and order rendered from the bench in the presence of defendant Kenneth Ellman and counsel for defendant Westchester County S.P.C.C. on February 1, 1991 and further order of the Court dated and entered on February 5, 1991 directing defendant Kenneth Ellman to turn over 17 specified handguns to the New York state Police on February 8, 1991.

3. You are hereby commanded, as the Sheriff of the County in the State of New York where defendant Kenneth Ellman is found, to arrest defendant Kenneth Ellman forthwith and to take all actions necessary to bring him before this Court to be committed into the custody of the Warden of the Westchester

County Jail until the judgment and sentence of this Court are satisfied.

Dated: White Plains, New York
June 7, 1991

s/ ALDO A. NASTASI

J.S.C.

RM5:ko arrest warrant

EXHIBIT D TO PETITIONER'S AFFIDAVIT

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third ***day of*** December ***A.D. 19***91

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-11 Mo. No. 1222

The People &c., by Robert Abrams, Attorney General, &c.,

Respondent,

v.

Westchester County S.P.C.C., a Special Not-For-Profit Corporation and Kenneth Ellman et al.,

Appellants.

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OFFICE OF LEGAL RECORDS
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A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion by defendant Ellman for leave to appeal be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the said motion by the remaining defendants be and the same hereby is dismissed upon the ground

that they are not parties aggrieved by the order of the Appellate Division.

/s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second ***day of*** April ***A.D. 1992***

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 157

The People &c., by Robert Abrams, Attorney General, &c.,

Respondent,

v.

Westchester County S.P.C.C., a Special Not-For-Profit Corporation and Kenneth Ellman et al.,

Appellants.

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A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Judge Alexander took no part.

/s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

EXHIBIT H TO PETITIONER'S AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLANT DIVISION : SECOND JUDICIAL DEPARTMENT

6940b
Z/em

WILLIAM C. THOMPSON, J.P.
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
DAVID S. RITTER, JJ.

93-00851, 93-00857, 93-00858

DECISION & ORDER ON MOTION

People of State of New York by Robert Abrams, Attorney General of the State of New York, respondent, v Westchester County S.P.C.C., etc., et al, defendants; and Jane Doe, as Officer and/or Directors of the Westchester County S.P.C.C., appellant.

Motion by the appellant Kenneth Ellman to stay enforcement of (1) a purported order of the Supreme Court, Westchester County, dated October 19, 1992, (2) an order of the same court, entered January 14, 1993, thereon, and (3) an order in a habeas corpus proceeding, entitled *Matter of Kenneth Ellman v. R.E. Davis, Warden of the Westchester County Penitentiary*, dated January 13, 1993, pending determination of the appeals therefrom.

Upon the papers filed in support of the motion, and no papers having been filed in opposition thereto, it is

ORDERED that the motion is denied; and it is further,

ORDERED that on the court's own motion, the appeal from the purported order dated October 19, 1993 (Case No.

93-00851), is dismissed, without costs or disbursements, on the ground that said purported order is merely a decision, which is not appealable.

THOMPSON, J.P., BRACKEN, SULLIVAN and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

March 2, 1993

PEOPLE OF STATE OF NEW YORK v WESTCHESTER COUNTY S.P.C.C.

EXHIBIT J TO PETITIONER'S AFFIDAVIT

At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Westchester at the County Courthouse, 111 Grove Street, White Plains, New York, on the 29th day of July, 1991.

PRESENT:
Hon. Aldo A. Nastasi,
Justice.

[FILED AUG 2 1991
Andrew J. Spano
County Clerk
County of Westchester]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,	:	
Plaintiff,	:	
-against-	:	Index No. 22360/1987
WESTCHESTER COUNTY S.P.C.C., a Not-For-Profit Corporation, and KENNETH ELLMAN and John and Jane Doe, as Officers and/or Directors and/or Agents of the WESTCHESTER COUNTY S.P.C.C.,	:	**JUDGMENT AND ORDER OF DISSOLUTION**
Defendants.	:	

Robert Abrams, Attorney General of the State of New York, having commenced an action pursuant to Articles 1, 5, 7 and 11 of the Not-for-Profit Corporation Law and Article 8 of the Estates, Powers and Trusts for a judgment and order dissolving the Westchester County S.P.C.C. ("Westchester SPCC") and for injunctive and related relief against the Westchester SPCC, its principal officer Kenneth Ellman, and its officers, directors, agents and peace officers;

And upon the Attorney General's complaint, verified on November 16, 1987, with proof of service; and upon the joint answer of defendants Westchester SPCC and Kenneth Ellman, verified by defendant Kenneth Ellman on December 28, 1987, with proof of service;

And upon the decision and order of Honorable Aldo A. Nastasi, dated and entered in the Westchester County Clerk's Office on January 25, 1991, with notice of entry dated January 31, 1991 and with proof of service, denying the Westchester SPCC's motion to dismiss the Attorney General's complaint and granting the Attorney General's cross motion for partial summary judgment to the extent that the Westchester SPCC was directed to register and report to the Office of the Attorney General pursuant to EPTL § 8-1.4;

And upon the notice of motion of the Attorney General dated April 3, 1991 and the supporting affirmation of David G. Samuels, Assistant Attorney General of the State of New York, dated April 3, 1991, with exhibits attached, with proof of service, seeking an order granting the Attorney General partial summary judgment dissolving defendant Westchester SPCC under the fourth, fifth and sixth causes of action of the Attorney General's compliant for willfully failing to register and report to the Attorney General as required by EPTL § 8-1.4 and the Court's decision and order of January 25, 1991; and upon the opposing affidavit of defendant Kenneth Ellman, sworn to April 11, 1991, with exhibits attached

including the affidavits of Nortrud Spero, Linda DeWitt, Michelle Guido and Maria Lopez, the four purported directors of the Westchester SPCC, with proof of service, to the extent that they responded to the Attorney General's motion for partial summary judgment dissolving the Westchester SPCC; and upon the opposing affidavit of David Cohen, Esq., of Lankenau & Bickford, Esqs., former attorneys for defendant Westchester S.P.C.C., sworn to on April 9, 1991, with proof of service; and upon the reply affirmation of Assistant Attorney General David G. Samuels, dated May 2, 1991 with proof of service;

And upon the decision and order of Honorable Aldo A. Nastasi, dated May 20, 1991 and entered in the Westchester County Clerk's Office on May 21, 1991, with notice of entry dated May 23, 1991 and with proof of service, finding, inter alia, that the Westchester SPCC willfully failed to register and report to the Attorney General as required by law and the direction of the Court in its order of January 25, 1991, and granting, inter alia, the Attorney General's motion for partial summary judgment and directing that the Westchester SPCC be dissolved in accordance with the N-PCL and the EPTL; and upon all of the pleadings and proceedings herein,

NOW, on motion of the plaintiff Attorney General of the State of New York, it is

ORDERED AND ADJUDGED, that judgment in favor of the Attorney General of the State of New York under the fourth, fifth and sixth causes of action of the Attorney General's complaint for judicial dissolution of the Westchester County S.P.C.C. for failing to register and report to the Attorney General as required by EPTL § 8-1.4 is granted. The Attorney General of the State of New York is directed to transmit certified copies of this Judgment of Dissolution and Order to the Department of State of the State of New York and to the County Clerk of Westchester County. Pursuant to

N-PCL § 1109(d), upon the filing of this judgment and order by the Department of State, the Westchester County S.P.C.C. shall be dissolved pursuant to N-PCL §§ 520 and 1101(a)(2) and EPTL § 8-1.4; and it is further

ORDERED AND ADJUDGED, that any and all current or former officers, directors, agents and representatives of the Westchester County S.P.C.C. who were registered as peace officers with the New York State Division of Criminal Justice Services based on their association with the Westchester County S.P.C.C. are no longer peace officers of the Westchester County S.P.C.C., and are permanently enjoined from exercising any of the authority of a peace officer based on Westchester County S.P.C.C. peace officer status; and it is further

ORDERED AND ADJUDGED, that the Westchester County S.P.C.C. shall distribute all of its assets that are remaining after paying or adequately providing for the payment of its liabilities to a duly incorporated society for the prevention of cruelty to children in the State of New York that is registered with the Office of the Attorney General in accordance with the requirements of EPTL § 8.1-4; and it is further

ORDERED AND ADJUDGED, that within 30 days of the entry of this Judgment of Dissolution and Order, the Westchester County S.P.C.C. shall arrange to turn over to the Westchester County Department of Social Services in White Plains, New York all of its files and records of investigations and court proceedings of cases of child abuse and neglect that are in the custody, possession and control of the Westchester County S.P.C.C. or any of its officers, officers, directors or agents including, but not limited to defendant Kenneth Ellman, Linda DeWitt, Nortrud Spero, Michelle Guido or Maria Lopez; and it is further

ORDERED AND ADJUDGED, that this Court shall retain jurisdiction of this action for the purpose of the enforcement of this Judgement and Order.

s/A.A.N

J.S.C.
ALDO A. NASTASI
JUSTICE OF THE SUPREME COURT

s/Andrew T. Spano

RM10/bg
SPCC ORDER

EXHIBIT M TO PETITIONER'S AFFIDAVIT

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of March 1993

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 96

In the Matter of Kenneth Ellman,

Appellant,

v.

Aldo A. Nastasi, a Justice of the Supreme Court of the State of New York, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

United States Court of Appeals
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

KENNETH ELLMAN,

Petitioner-Appellee

v.

R.E. DAVIS, WARDEN, Etc.,

Use short title Respondent-Appellant

93-2819

Docket Number

NOTICE OF MOTION

state type of motion

To supplement the record

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

RICHARD D. EMERY, P.C.
Counsel for Petitioner-Appellant
1740 Broadway -25th Fl
New York, New York 10019
Richard D. Emery, Esq. (212) 603-6426

Has consent of opposing counsel:

A. been sought? [ ] Yes [x] No
B. been obtained? [ ] Yes [x] No

Has service been effected? [x] Yes [ ] No

Is oral argument desired? [ ] Yes [ ] No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? [ ] Yes [x] No
B. by firm date of argument notice? [ ] Yes [x] No
C. If Yes, enter date: _____

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

G. OLIVER KOPPELL
Attorney General of the State of New York
120 Broadway, New York, NY 10271
Patricia Mann, Esq.
(212) 416-8396

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [ ] No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard [ ] Yes [ ] No

Judge or agency whose order is being appealed: United States District Court, S.D.N.Y. (Brieant, J.)

Brief statement of the relief requested: Petitioner seeks to supplement the record in order to provide evidence of plain factual errors in decision on appeal dated December 15, 1994. Petitioner is also seeking rehearing *en banc* on the basis of these errors. FRAP 106

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Richard Emery

Signed name must be printed beneath

Richard Emery

Appearing for: *(Name of party)* Appellant or Petitioner:
[ ] Plaintiff [ ] Defendant
Appellee or Respondent:
[x] Plaintiff [ ] Defendant

Kenneth Ellman

Date

12/29/94

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted [✓] denied

UNITED STATES COURT OF APPEALS
FILED
JAN 09 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

/s/ Roger D. Miner

Previous requests for similar relief and disposition: NONE

Statement of the issue(s) presented by this motion:

Whether petitioner who simultaneously seeks rehearing or rehearing *en banc* in this court may supplement the record to prove that critical assertions in the decision on appeal are factually erroneous.

Brief statement of the facts (*with page references to the moving papers*):

The decision on appeal, from which rehearing is sought, reversed a grant of a writ of habeas corpus on the grounds that petitioner failed to exhaust state remedies. The basis for this finding was the factually erroneous assertion that petitioner had failed to exhaust state remedies because he had not submitted proposed orders memorializing the denial of his state habeas petition. The evidence annexed to the supporting Affirmation of Richard D. Emery ("Emery Aff.") demonstrates conclusively that petitioner's counsel submitted, not one, but *two* proposed orders to the state trial court, and that the panel's reliance on a contrary view of the facts was mistaken. Emery Aff. p.p. 2-5

Summary of the argument (*with page references to the moving papers*):

Leave to supplement the record with these documents is critical to a fair determination of petitioner's petition for rehearing. Emery Aff., p.p. 2-5.

Appeal Docket No.: 93-2819

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KENNETH ELLMAN,

Petitioner-Appellee,

- against -

R.E.DAVIS, Warden, Westchester County Penitentiary,

Respondent-Appellant.

AFFIRMATION OF RICHARD D. EMERY IN SUPPORT OF PETITIONER'S MOTION TO SUPPLEMENT THE RECORD

RICHARD D. EMERY, an attorney admitted to practice in this State and before this Court, affirms under penalty of perjury as follows:

1. As counsel to petitioner-appellee Kenneth Ellman ("petitioner" or "Ellman"), I submit this affirmation in support of petitioner's motion pursuant to Federal Rule of Appellate Procedure 10(e) to supplement the record on appeal. I have been retained to prosecute the instant application and the petition for rehearing and suggestion for rehearing *en banc* (the "Petition") filed together herewith, and I am fully familiar with the facts and circumstances of this litigation. Except where expressly noted, I make his affirmation upon personal knowledge.

2. In the decision dated December 15, 1994 reversing the District Court's grant of a writ of habeas corpus to petition (the "Decision"), a panel of this Court (the "Panel") relied on

several assertions which were factually erroneous. The submissions annexed hereto are necessary to determining the Petition insofar as they provide uncontrovertible proof that the facts were not as the Panel stated in the Decision. Indeed, denial of petitioner's motion to supplement the record would work a manifest injustice and fundamental miscarriage of justice, in that it would rob petitioner of the undisputed factual basis for rehearing and rehearing *en banc*. *Dobbs v. Zant*, -- U.S. --, 122 L.Ed.2d 103 (1993).

3. Foremost among the Panel's factual errors was the statement that Ellman and his counsel had failed to submit or resubmit a proposed order to the state trial court Hon. Aldo Nastasi (Westchester County Supreme Court) (the "trial court") in connection which the trial court's oral denial of Ellman's state habeas corpus petition. Decision at 6-7, 10, 11, 14 and 15.

4. Petitioner perfected and argued the appeal of the District Court's grant of the writ *pro se*. At the oral argument before the Panel, in response to questions from the Bench, petitioner expressly told the Panel that his counsel in the state proceedings *had* submitted at least one such proposed order. Tr. at 23. September 21, 1994 Argument before the Second Circuit Court of Appeals, Transcript at 25-26.

5. Thereafter, on October 28, 1994, petitioner (still acting *pro se*) directed a letter to the Clerk of the Court enclosing ten copies of what he represented were two cover letters written by petitioner's state-court counsel to the trial court, which letters purported to enclose a proposed and revised proposed order, respectively. Ellman asked that these documents be distributed to the Court. (Exhibit 1, Letter from Ellman to Clerk, October 28, 1994).

6. Notwithstanding petitioner's statement at oral argument, and his later submission, in the Decision, the Panel repeatedly relied upon the erroneous factual contention that

petitioner's then-counsel had not submitted to the trial court a proposed order memorializing denial of the state habeas corpus petition.

7. Annexed hereto as Exhibit 2 is an affidavit of Charles Fiore, Esq., the attorney for petitioner in the state habeas proceeding, sworn to December 28, 1994 (the "Fiore Affidavit"). As the Fiore Affidavit and its exhibits make plain, petitioner's counsel submitted not one but two proposed orders to the trial court, as petitioner himself indicated at oral argument and in his October 28, 1994 letter to the Clerk. Specifically, the Fiore Affidavit includes as exhibits, *inter alia*: (i) copies of two cover letters directed to the trial court, dated September 29, 1992 and October 1, 1992, transmitting a proposed order and revised proposed order; (ii) a copy of the revised proposed order transmitted to the trial court on October 1, 1992; and (iii) certain Federal Express records (the "Fed Ex Records") indicating that the two transmittal letters from Mr. Fiore to the trial court were properly delivered by Federal Express to the trial court. Additionally, the Fiore Affidavit explains the precise circumstances under which he submitted then re-submitted proposed orders to the trial court, and points up the remarkable similarities between the petitioner's revised proposed order -- which the trial court claimed (and the Panel accepted) was never received by the trial court -- and the January 13, 1993 order produced by the trial court, allegedly "on its own." Decision at 7.

8. Additionally, the Fed Ex Records demonstrate conclusively that two letter packages were sent by petitioner's then-counsel to the trial court, on September 29, 1992 and October 1, 1992, and delivered to the trial court on September 30 and October 2 respectively.

9. The Fed Ex Records, together with the Fiore Affidavit and its exhibits, seriously undermine the trial court's (and the Attorney General's) claims -- which were accepted by the

Panel and repeatedly relied upon -- that petitioner's counsel failed to submit or resubmit proposed orders to the trial court following an oral ruling denying Ellman's state habeas corpus petition.

10. The Fed Ex Records, the Fiore Affidavit and its other exhibits are of tremendous evidentiary value. Without them, Ellman's petition for rehearing and suggestion for rehearing *en banc* has less basis for success -- and the Panel's plain factual mistakes will go uncorrected, causing manifest injustice to petitioner and a continuing fundamental miscarriage of justice.

11. For the Court's convenience, I annex hereto as Exhibit 3 a copy of the Appellate Division, Second Department's May 21, 1993 order granting Ellman leave to withdraw two notices of appeal then pending in that court. This order is referred to in the Petition, but was never had a part of the appendices submitted to the Panel on the original appeal.

12. Also for the Court's convenience, a copy of the Petition (which includes a copy of the Decision) is annexed hereto as Exhibit 4, and the transcript of the oral argument before the Panel on September 21, 1994 is annexed as Exhibit 5.

13. For the foregoing reasons, petitioner's motion to supplement the record must be granted.

Dated: New York, New York
December 29, 1994

/s/ Richard Emery

Richard D. Emery (RE 5181)

EXHIBIT 1 TO EMERY AFFIDAVIT

KENNETH ELLMAN
BOX 18
NEWTON, NEW JERSEY 07860
201-948-6961

October 28,, 1994
Honorable George Lange III, Clerk of the Court
United States Court of Appeals, Second Circuit
United States Courthouse
New York, N.Y. 10007

Ref: Ellman v. Davis
93-2819

Dear Mr. Lange,

I make this submission pursuant to authority of Rule 28 (j) of the Federal Rules of Appellate Procedure. I enclose ten copies and ask that it be transmitted to the Court.

During the course of my oral argument on September 21, 1994 I was specifically questioned by the Court (I believe it was the Presiding Judge), as to whether I submitted orders for the denial of my State Habeas Corpus. My recollection of oral argument is that I answered the Court that, yes, I had submitted an Order, although I did not know if a second order was also submitted.

I have now obtained and herewith attach the letters of transmittal of the Orders as follows:

(a) From Lewis and Fiore, Attorney, dated September 29, 1992 transmitting the original Order to Honorable Aldo Nastasi;

(b) From Lewis and Fiore, Attorney, dated October 1, 1992 transmitting the revised order (at request of State Court) to the Honorable Aldo Nastasi.

Both of the above were sent to the State Court by Federal Express.

My answer then remains that **Yes,** I did submit an order for the State Habeas Corpus and **Yes,** the second Order was also submitted. As the District Court decision states the State Court refused to issue an Order dismissing the Writ of Habeas Corpus. This refusal of the State Court was State Action beyond the control of the Appellee. This is discussed in my Appellee brief, page #24, #25 and #26 and in the decision of the District Court, 838 F. Supp. 98.

Appellant Attorney-General states that no order was submitted by Appellee in the State Habeas proceeding (see Appellant Attorney-General brief page #25). Yet, the **State Court** clearly stated (thereby admitting) that it requested a **re-submit,** meaning that it **admitted** it received the first order and at the same time took notice that Appellee stated that it had submitted **a second** order at the State Court request. (see Appellee brief page #25 and the State Court Order dated January 14, 1993 attached as Exhibit G to the Federal Writ of Habeas Corpus. Thank you for your consideration.

Sincerely,

Kenneth Ellman

cc: Attorney-General, 120 Broadway, N.Y., N.Y. 10271

EXHIBIT 3 TO EMERY AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK APPELLANT DIVISION : SECOND JUDICIAL DEPARTMENT

9620b
Y/em

WILLIAM C. THOMPSON, J.P.
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
DAVID S. RITTER, JJ.

93-00857, 93-00858

DECISION & ORDER ON MOTION

People of State of New York by Robert Abrams, Attorney General of the State of New York, respondent, v Westchester County S.P.C.C., etc., et al, defendants; and Jane Doe, as Officer and/or Directors of the Westchester County S.P.C.C., appellant.

Motion by the appellant Kenneth Ellman to withdraw appeals from (1) an order of the Supreme Court, Westchester County, entered January 14, 1993, and (2) an order in a habeas corpus proceeding, entitled *Matter of Kenneth Ellman v. R.E. Davis, Warden of the Westchester County Penitentiary*, dated January 13, 1993.

Upon the papers filed in support of the motion, and the papers filed in opposition and relation thereto, it is

ORDERED that the motion is granted and the appeals are deemed withdrawn, without costs or disbursements.

THOMPSON, J.P., BRACKEN, SULLIVAN and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

May 21, 1993
PEOPLE OF STATE OF NEW YORK v WESTCHESTER COUNTY S.P.C.C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENNETH ELLMAN
as Applicant for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254

-against-

Warden R.E. Davis
Westchester County Penitentiary
and any other person having custody of Kenneth Ellman

ORDER TO SHOW CAUSE

Index# 93 Civ. 2164

U. S. DISTRICT COURT
FILED W.P.
JAN 18 1995
S. D. OF N.Y.

Upon the annexed affidavit of Kenneth Ellman sworn to January 11, 1995 and the exhibits attached thereto of the affidavit of Charles Fiore, Esq. sworn to December 28, 1994 and the exhibits attached thereto and upon the Memorandum and Order of this Court dated October 12, 1993 and upon the Decision of the Court of Appeals for the Second Circuit dated December 15, 1994 and upon all proceedings had herein;

Let the Respondents Warden R.E. Davis and the Attorney-General of the State of New York, show cause before this United States District Court at the United States Courthouse, White Plains, New York 10601 on January *18*, 1995 at 12:30 p.m. or as soon thereafter as counsel may be heard, why an Order Correcting, Modifying or Supplementing the Record on Appeal in this matter in the interests of justice and pursuant to Rule 10 (e) of the Federal Rules of Appellate Procedure for the United States Court of Appeals should not be granted forthwith.

Sufficient reason appearing therefore, let service of a copy of this Order together with the affidavits and exhibits attached thereto upon which it was granted be made upon the Respondent Attorney-General of the State of New York, 120

Broadway, New York, N.Y. 10271 by United States Express Mail (overnight delivery) on or before January *13*, 1995 be deemed good and sufficient service.

Dated: January *12*, 1995
White Plains, New York

So Ordered:

/s/ Charles Brieant

Hon: Charles Brieant
United States District Judge

1/12/95

RECEIVED
N.Y.S. DEPARTMENT OF LAW
NEW YORK CITY OFFICE

95 JAN 12 PM 4:30

/s/ S.M.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENNETH ELLMAN
as Applicant for Writ of Habeas Corpus
pursuant to 28 U.S.C. 2254

-against-

Warden R.E. Davis
Westchester County Penitentiary
and any other person having custody
of Kenneth Ellman

Affidavit of Kenneth Ellman in Support of Order to Show Cause

Index #93
Civ. 2164

KENNETH ELLMAN, being duly sworn deposes and says:

1. I am the Petitioner in the above encaptioned matter. My address for service of process and all papers in this matter is Box 18, Newton, New Jersey 07860. My telephone number is 201-948-6961.

2. I make this application for an Order to Supplement, Correct or Modify the Record in the interests of justice and pursuant to Federal Rules of Appellate Procedure number 10 (e).

3. It appears that a manifest injustice and error of fact is contained in the Record herein and that correction is necessary to truly disclose what occurred in the District Court. Petitioner seeks to have this record made to conform to the truth. The exhibits as herein detailed are material to this matter and may be absent from the Record either by error or accident. Rule 10 (e) of the Federal Rules of Appellate Procedure specifically authorize the District Court to make such a correction in the Record.

4. Petitioner herein has made a motion to supplement the Record in this matter to the Court of Appeals. However Petitioner has been informed by the office of Pro Se Clerk, of the

Court of Appeals, that such motions are preferred to me made in the District Court as that is the Court wherein the Record originates and is transmitted from. The motion in the Court of Appeals was denied and since such motions in that Court are not favored, therefore I am making this instant motion in the proper forum of this District Court.

5. Petitioner asks this Court to Correct and Modify the Record to reflect the truth that Federal Express **twice** delivered to the Honorable Aldo Nastasi proposed orders denying my State Writ of Habeas Corpus. Petitioner attaches such documentary evidence and details as follows:

6. **Exhibit #1** is a copy of the affidavit of Charles Fiore, Esq., an attorney of record who appeared in the State proceedings on my behalf, sworn to December 28, 1994. His affidavit is based upon the official records and files maintained by his office. the Federal Express Corp. and the State and District Court Record in this case. In this affidavit Mr. Fiore details how he ***twice*** transmitted proposed orders so that I could appeal my denial of the State Writ of Habeas Corpus. The Fiore affidavit contains as exhibits signature proof of receipt of the proposed orders by the Honorable Aldo Nastasi, copies of the proposed order prepared by Mr. Fiore, letters of transmittal and the original Fedx airbills.

7. I adopt in all respects the affidavit and exhibits of Charles Fiore as my own and herewith **Index** his exhibits as follows:

Exhibit-A, page nineteen of the transcript of proceedings from the Supreme Court, Westchester County, in the matter of the State Application by Kenneth Ellman for a Writ of Habeas Corpus dated September 28, 1992 showing a denial by court transcript only;

Exhibit-B, Letter of transmittal of proposed order denying State Writ of Habeas Corpus from Charles Fiore Esq. to Hon.

Aldo Nastasi dated September 29, 1992; "proof of performance" (proof of delivery) from Federal Express Corporation showing that letter was delivered to the Honorable Aldo Nastasi with signature proof and copy of original airbill;

Exhibit-C, Letter of transmittal of second proposed order dated October 1, 1992 from Charles Fiore, Esq. to Hon. Aldo Nastasi, with copy of the actual proposed order and proof of delivery from Federal Express Corp. showing that the letter was delivered to the Hon. Aldo Nastasi with signature proof and copy of original airbill;

Exhibit D-, Copy of Order of the Honorable Aldo Nastasi filed and entered on January 14, 1993.

8. Petitioner submits that the District Court has the responsibility and authority to correct errors, accidents or omissions in it's **own** record to avoid a further and continuing fundamental miscarriage of justice and manifest injustice. The District Court has the authority and duty to have **"the record made to conform to the truth"** (F.R.A.P. 10 (e).

9. If the record in this case is not made to conform to the truth a fraud and deception will have been perpetrated upon our Federal Courts and a continuing fundamental miscarriage of justice may result.

10. No Ex Parte relief is being requested in this application and no such application has been previously made to the District Court. The aforementioned previous application to the Court of Appeals should have been directed to this Court.

11. I bring this application by Order to Show Cause instead of by motion because it is essential to the interests of justice that this application be granted in time for review of the corrected record to be made by the Court of Appeals. No mandate has issued from the Court of Appeals as of the date of this application.

Wheretofore Petitioner begs, prays and demands that the Record on Appeal in this matter be Corrected and Modified to reflect the truth by having the affidavit of Charles Fiore, Esq. with all the aforementioned exhibits made part of the Record herein.

/s/ Kenneth Ellman

Kenneth Ellman

Sworn To Before Me This 11 day of January, 1995

/s/Andrea

Notary Public, State of New Jersey

Andrea Elise Jorgensen
Notary Public of New Jersey
My Commission Expires Oct. 8, 1996

EXHIBIT 1 TO ELLMAN AFFIDAVIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Kenneth Ellman	Court of Appeals Docket #93-2819
vs.	District Court Docket #93-Civ2164
R.E. Davis, Warden Westchester County Penitentiary	**Affidavit of** **Charles Fiore, Esq.**

Charles Fiore being duly sworn deposes and says:

1. I am a partner in the firm of Lewis and Fiore and am duly admitted to practice law in the State of New York and before the United States Court of Appeals for the Second Circuit.

2. I make this affidavit upon reading the decision of the United States Court of Appeals for the Second Circuit dated December 15, 1994 under Docket Number 93-2819 as above encaptioned.

3. Upon reading the aforementioned decision I determined that I had an ethical obligation both as an Officer of the Court and as the former attorney to Petitioner-Appellee Kenneth Ellman to make this affidavit. I offer this affidavit not just as the former Attorney for Kenneth Ellman but to satisfy my ethical obligation to this Court of Appeals and ask that it be accepted as **"Amicus Curiae".**

4. In the month of September 1992 David Lewis, Esq., my partner in the firm of Lewis and Fiore was retained to represent Mr. Kenneth Ellman in his efforts to obtain release from an illegal imprisonment in the Westchester County Penitentiary. It was my responsibility with Mr. Lewis to assist and represent Mr. Ellman in the preparation and filing of a State

Writ of Habeas Corpus in the Supreme Court, Westchester County. This Writ was in fact filed and signed by the Honorable Also Nastasi on September 24, 1992. The Record on Appeal in the Appellate Division, Second Department under Case Number 93-00851, pages 237 et.al. show this State Writ of Habeas Corpus. I am informed that this State Appellate Record is part of the record in this Court of Appeals.

5. On September 28, 1992, the Honorable Aldo Nastasi held an on the Record proceeding to hear and determine the State Writ of Habeas Corpus. The State Court did not hold any evidentiary hearings but made a summary **"decision and order"** denying the State Writ. The Court held the transcript of the proceedings to be its decision and order. No other order was issued by the Court, until four months later on January 14, 1993. The Attorney-General, the agency seeking to keep Kenneth Ellman imprisoned never sought any order on this Writ application.

6. I attach hereto as **Exhibit A** page 19 of the transcript of proceedings as taken by the Official Court Reporter on that date recording the "decision and order" denying the State Writ .

7. I believed that Kenneth Ellman was entitled to an Appealable Order. So, on September 29, 1992 at approximately 12:30 p.m. I called the chambers of the Honorable Aldo Nastasi at 914-285-4314. I spoke to a person who identified themselves as the "Judge's secretary" and I informed them I wanted to submit an order. I was told that it "was not the Judge's usual practice" to have an order submitted" but that I could do that if I wanted to.

8. On September 29, 1992, the same day of the above conversation, I prepared and sent to the Honorable Aldo Nastasi an Order denying the State Writ of Habeas Corpus. This was sent by Federal Express #7706433276. Federal Express delivered my Order on September 30, 1992 to Mr. E. Kovalik an

employee of the Supreme Court assigned to the Honorable Aldo Nastasi. I attach hereto as **Exhibit B** my letter of transmittal dated September 29, 1992 with the "Proof of Performance" (proof of delivery) by Federal Express. The proof of delivery includes a copy of the signature of Mr. E. Kovalik and shows delivery to the Honorable Aldo Nastasi. I also attach a copy of the original Federal Express airbill.

9. On October 1, 1992 at approximately 9:30 a.m. my office received a call from Ms. Helen Coleman of Judge Nastasi's chambers asking me to call back as soon as possible.

I returned the call that day and distinctly remember Ms. Coleman telling me that we would have to re-submit the order because our proposed order failed to include any mention of the decision on the motion for recusal. On October 1, 1992, that very day of the phone call, we submitted a new order making reference to the denial of the recusal motion. I attach hereto as **Exhibit C** my letter of transmittal dated October 1, 1992 and a copy of the proposed order attached thereto. I sent this to the Honorable Aldo Nastasi by Federal Express #7706433280. I further attach hereto as Exhibit C the "proof of delivery" by Federal Express along with a copy of the signature of J. Ruiz who is an employee of the Supreme Court assigned to the Honorable Aldo Nastasi.

My computer records show that the proposed order attached hereto was indeed recorded in my computer on October 1, 1992.

10. In my review of my records and the order eventually signed by the Honorable Aldo Nastasi on January 13, 1993 and stamped entered on January 14, 1993 (attached to the Federal Writ of Habeas Corpus as Exhibit G by Kenneth Ellman) there is an unlikely and uncanny duplication of my order submitted on October 1, 1992.

The Order of Judge Nastasi starts:

> **"The issues in this proceeding have come on to be heard at a IAS Part of this Court..."**

We left a blank before the IAS part number because my secretary typing the order did not know the part number for Judge Nastasi's part. When the Judge had his order typed and issued, allegedly without the benefit of our proposed order, he also typed **"at an IAS part of this Court"** without mentioning the part number.

The remainder of the first paragraph of the Judges Order is identical to the first paragraph of my proposed order except for referring to Mr. Molic and Delany as "Deputy Attorney-General" rather than "Assistant Attorney-General". It is highly improbable that Judge Nastasi making his own Order in January of 1993 would come up with the exact same words I used in my proposed Order submitted on October 1, 1992.

11. The second page of the Judge Nastasi's Order, other than the word "adjudged" at the top and the form at the bottom, **is identical in all 44 words and every comma, capitalization and spacing** to the proposed order which we submitted. It is clear that the order of Judge Nastasi was made using my proposed order.

Attached hereto as **Exhibit D** is the Order of Hon. Aldo Nastasi January 13, 1993 and stamped entered January 14, 1993.

It is highly unusual for a Judge to mention in his order that he has requested a re-submission of the order. This acknowledges that he received the original order and claims he did not receive a re-submit. At no time was I or my firm informed by the State Court in any manner that it had not received my two proposed orders. On the contrary after receiving my first proposed order Ms. Helen Coleman called me and requested another proposed order which I immediately sent as herein detailed.

12. I believe that I have an obligation to inform this Court of Appeals that the State Record is not as was presented to this Court.

13. This is further confirmed by the complaint of Kenneth Ellman in his affidavit dated October 19, 1992 and part of the State Record under Appellate Division Case Number 93-00851, pages 430 et. al. Kenneth Ellman filed his affidavit while imprisoned and complains to the Court as regards the State Habeas:

> **"Counsel for Defendant submitted a Judgment and still no written order has been issued again leaving the defendant without ability to appeal".**
>
> (see page 431, State Record on Appeal)

14. This strange and deliberate behavior of the State Court is clearly shown by the repetitive course of conduct in refusing to issue normal appealable orders of imprisonment of Kenneth Ellman, thereby leaving him without state recourse, helpless and unable to seek judicial review for nine months.

The record is clear that the State Court avoided on several occasions the issuance of an appealable order not only in this instance but in "so ordering" a transcript which is apparently not considered appealable in the Second Department where the Court sits (see Exhibit H of the Federal Writ of Habeas Corpus), and on a third occasion when it administratively altered Mr. Ellman's sentence again without the issuance of a formal order (see State Record, Case #93-00851, page 77, the "Dispositions" bearing the signature of the Court and page 375, wherein the State Court denies it ever issued any order).

16. In addition to the State Court refusing to issue an Order and so-ordering the October 19, 1992 transcript, I was directly contacted by the Attorney-General at that time, and informed that the State Court indicated it would not issue an Order. The transcript of October 19, 1992 clearly states that the Court

would contact the Attorney-General to determine what type of Order to issue and seek the help of the Attorney-General. This is further confirmed by the transcript of Oral Argument before this Court of Appeals wherein the Attorney-General admits that they also did not submit an Order "because the Court indicated it would pursue it in this way". (See page #5 of the Oral Argument Transcript and the tape recording of Oral Argument before this Court of Appeals).

17. I am prepared to testify in a fact-finding hearing in the United States District Court to correct serious and substantial factual errors as herein set forth.

In Order to avoid a further fundamental miscarriage of justice and reliance by the this Court of Appeals upon incorrect factual assertions I ask that my affidavit be accepted.

/s/ Charles Fiore

Charles Fiore Esq.

Dated:December 29, 1994

Sworn To Before Me this 28 Day of December, 1994

/s/ Allison Miller

Notary Public

ALLISON MILLER
Notary Public, State of New York
No. 02MI5020534
Qualified in New York County
Commission Expires Nov. 22, 1995

from judgment or order. Am I correct, Mr. Ellman still has that avenue open to him should he choose to pursue it?

THE COURT: Certainly.

MR. FIORE: Your Honor, may I have a moment to consult with my client? I think there is another matter he wishes me to raise with the court.

THE COURT: Certainly.

(Client and counsel confer.)

MR. FIORE: Nothing further, your Honor.

THE COURT: All right, then accordingly the comments that the court has made upon the record, shall spread upon the record, is the decision and order of this court as relates to this petition before the court. That having been said, the matter is concluded.

THE COURT: Have Mr. Ellman brought back to the court-room.

(Open court.)

THE COURT: Very briefly in the

EXHIBIT B TO ELLMAN AFFIDAVIT

LEWIS & FIORE
ATTORNEYS AT LAW
225 BROADWAY
NEW YORK, N.Y. 10007-3001
(212) 285-2290
FAX (212) 964-4506

DAVID L. LEWIS
CHARLES G. FIORE

ALLISON MILLER
ADMITTED NY AND NJ

September 29, 1992

Hon. Aldo Nastasi
Justice
State Supreme Court
Westchester County
111 Grove Street
White Plains, New York 10601

RE: Application of Kenneth Ellman against R.E.Davis, Warden of the Westchester County Penitentiary

Dear Judge Nastasi:

Enclosed please find the Order for Mr. Ellman's petition for writ of habeas corpus. Please notify us by telephone as soon as the Order is signed.

Very truly yours,

/s/ Charles G. Fiore

CHARLES G. FIORE

CGF/jjh
Enclosure

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3				5254990300					
4				5695686916					
5		Kilpezzc		4713922511	VII			0955	
6				4584017185					
7		HOPK.S		4387059246				1002	
8				4941897140				1006	
9		T. Vitberi		5695398214					
10		R. Kelly	0100-3494-3	245961504 2				1011	
11		Edward Kowalyc		7706433276				1015	
12		Luiz		5548861791				1016	
13		CARTER		8925455619				1019	
14		DISANTO		168 0501 663				1021	
15		Clarkow		4690 1695	Goldsboro			1030	
16		Medina		7060843002-	Wilbrove	15	50	1044	
17				4178 0344 21		10	50	1047	
18				4923956144					
19				4296933060					
20				4369949216					
21				4732642983					
22				4931573555					
23		A. Cooley		4678831942				1055	
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25				715 7035 695					

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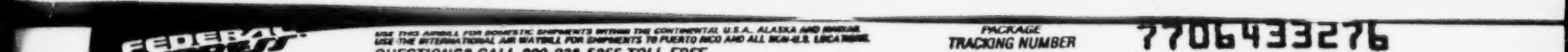
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Recipient's Phone Number (Very Important):
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Department/Floor No.:
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LEWIS & FIORE
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FAX (212) 964-4506

DAVID L. LEWIS
CHARLES G. FIORE

ALLISON MILLER
ADMITTED NY AND NJ

October 1, 1992

Hon. Aldo Nastasi
Justice
State Supreme Court
Westchester County
111 Grove Street
White Plains, New York 10601

RE: Application of Kenneth Ellman against R.E.Davis, Warden of the Westchester County Penitentiary

Dear Judge Nastasi:

Enclosed please find the revised Order for Mr. Ellman's petition for writ of habeas corpus. Please notify us by telephone as soon as the Order is signed.

Very truly yours,

/s/ Charles G. Fiore

CHARLES G. FIORE

CGF/jjh
Enclosure

FEDERAL EXPRESS

EXHIBIT C TO ELLMAN AFFIDAVIT

At a IAS Part of the Supreme Court of the State of New York, County of Westchester, held at the Courthouse, New York on October _, 1992.

PRESENT: Hon. Aldo Nastasi, Justice

INDEX NO. 16684/92

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

Application of

KENNETH ELLMAN,

Petitioner,

For a writ of Habeas Corpus pursuant to Article 70 of the New York C.P.L.R.

-against-

R.E. Davis, Warden of the Westchester County Penitentiary or other persons having custody of KENNETH ELLMAN,

Respondent.

----------X

PETITION FOR WRIT OF HABEAS CORPUS

The issues in this proceeding have come on to be heard at a IAS Part of this Court, Westchester County, at the Courthouse, 111 Grove Street, White Plains, New York, on September 28, 1992, before Justice Aldo Nastasi; petitioner appeared by Charles G. Fiore, Esq. of Lewis & Fiore, his

counsel, and respondent appeared by Robert R. Molic and Sean Delaney, Esqs., Deputy Attorney-Generals, and the petitioner having moved on the record for the recusal of Justice Aldo Nastasi.

NOW, on motion of Lewis & Fiore, attorney for the petitioner, judgment is entered as follows:

ADJUDGED:

1. The petitioner's motion for recusal is denied.

2. That the writ of habeas corpus be and the same is hereby dismissed.

3. That KENNETH ELLMAN, the petitioner, be and is hereby remanded back to the custody of the Warden of Westchester Penitentiary, at Valhalla, New York.

ENTER.

_____

ALDO NASTASI
Justice, Supreme Court
Westchester County

Judgment entered this day of , 1992.

_____

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DATE: November 22,1994

KENNETH ELLMAN
LEWIS & FIORE
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WHITE PLAINS, NY 10601
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2				280 5716 273				
3				4266155935				
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6				5216455020				
7				894815[illegible]				
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9				7153035024				
10				5744420676				
11		Williams Luiz	*	7706433280	*		1020	
12		Carlucci		3467925985			1025	
13		LANZETTA		221 5439 037			026	
14				3467925985				
15		IANNUCCI		4575136296			1027	
16		Metakes		419346[illegible]344			1028	
17				4303501296			1055	
18		A. Cooley		4732642751				
19		E Altman		[illegible]	2 Longwood		1 CK	
20				463 0445 985	[illegible]		1107	
21		Foxx		5722000465			1110	
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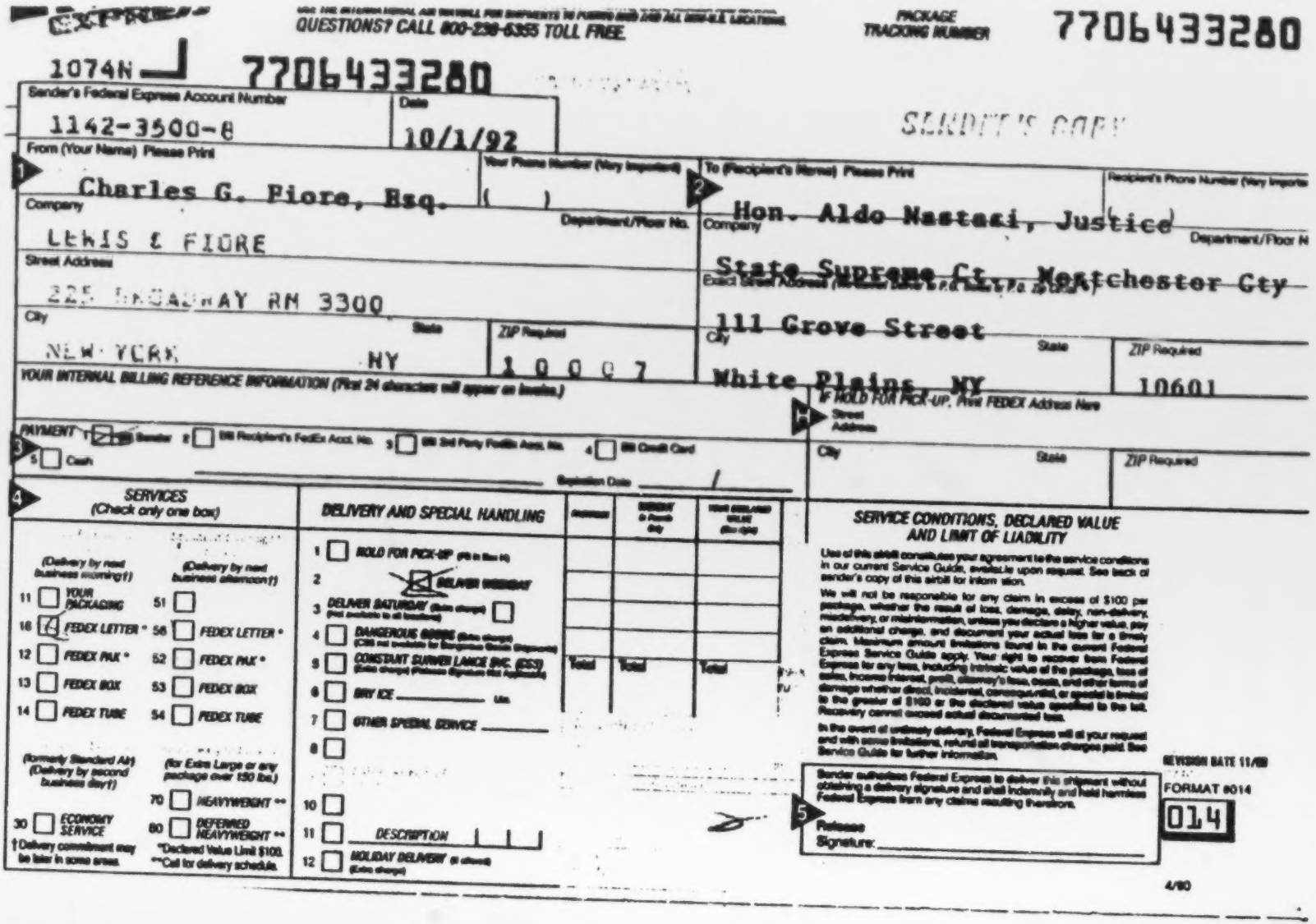

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(Delivery by next business afternoon†)

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56 [ ] FEDEX LETTER *

52 [ ] FEDEX PAK *

53 [ ] FEDEX BOX

54 [ ] FEDEX TUBE

(Formerly Standard Air) (Delivery by second business day†)

30 [ ] ECONOMY SERVICE

(for Extra Large or any package over 150 lbs.)

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†Delivery commitment may be later in some areas.

*Declared Value Limit $100.

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2	[X] DELIVER WEEKDAY			
3	DELIVER SATURDAY (Extra charge) [ ]			
4	[ ] DANGEROUS GOODS (Extra charge) (Not available for Overnight Courier Shipments)			
9	[ ] CONSTANT SURVEILLANCE SVC. (CSS) (Extra charge) (Unavailable for Overnight Courier Shipments)	Total	Total	Total
6	[ ] DRY ICE ____ Lbs.			
7	[ ] OTHER SPECIAL SERVICE ____			
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COUNTY CLERK**

SUPREME COURT OF THE STATE
OF NEW YORK
COUNTY OF WESTCHESTER

----------X

Application of

KENNETH ELLMAN,

Petitioner,

For a Writ of Habeas Corpus pursuant to Article 70 of the New York C.P.L.R.

- against -

R.E. Davis, Warden of the Westchester County Penitentiary or other persons having custody of KENNETH ELLMAN,

Respondent.

----------X

INDEX NO.
16684/92

ORDER AND JUDGMENT ON PETITION FOR WRIT OF HABEAS CORPUS

NASTASI, J.

The issues in this proceeding have come on to be heard at an IAS Part of this Court, Westchester County, at the Courthouse, 111 Grove Street, White Plains, New York, on September 28, 1992, before Justice Aldo Nastasi; petitioner appeared by Charles G. Fiore, Esq. of Lewis & Fiore, his counsel, and respondent appeared by Robert R. Molic and

Sean Delany, Esqs. Assistant Attorneys General, and the petitioner having moved on the record for the recusal of Justice Aldo Nastasi.

NOW, on its own motion, this Court having heretofore advised Lewis & Fiore, attorney for the petitioner, to re-submit a copy of an order essentially identical in all substantive respects to this Order, which Order petitioner's attorney alleges has been previously submitted, this Court having not received such previous Order, and upon petitioner's failure to re-submit same, orders that judgment is entered as follows:

1. The petitioner's motion for recusal is denied.

2. That the writ of habeas corpus be and the same is hereby dismissed.

3. That KENNETH ELLMAN, the petitioner, be and is hereby remanded back to the custody of the Warden of Westchester Penitentiary, at Valhalla, New York.

So Ordered.

Dated: White Plains, New York
January 13, 1993

ENTER

/s/ Aldo A. Nastasi

ALDO A. NASTASI, J.S.C.

Judgment entered this day
of 1993

No. 94-1649

Supreme Court, U.S.
FILED
MAY 10 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KENNETH ELLMAN,

Petitioner,

—against—

R.E. DAVIS, Warden, Westchester County Penitentiary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondent
120 Broadway
New York, New York 10271
(212) 416-8400

VICTORIA A. GRAFFEO
Solicitor General

ANDREA GREEN
Deputy Solicitor General

PAMELA A. MANN*
SEAN DELANY
Assistant Attorneys General
of Counsel

**Counsel of Record*

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Statement of the Case	2
A. The State Court Action	2
B. State Court Challenges to Detention	5
C. The Federal Habeas Corpus Proceeding	7
D. The Decision of the Court of Appeals	8
Reasons for Denying the Writ	9
Conclusion	13

TABLE OF AUTHORITIES

Cases PAGE

Coleman v. Thompson, 501 U.S. 722 (1991)..... 9

Duckworth v. Serrano, 454 U.S. 1 (1981) 10

Engle v. Isaac, 456 U.S. 107 (1982)..... 10

Fay v. Noia, 372 U.S. 391 (1963)..... 9

Herrera v. Collins, ___ U.S. ___, 113 S.Ct. 853, 122 L.E. 2d 203 (1993) 12

Murray v. Carrier, 477 U.S. 478 (1986)..... 11

Picard v. Connor, 404 U.S. 270 (1971)..... 10

Federal Statutes and Constitutional Provisions

28 U.S.C. § 2254 7

United States Constitution, Fifth Amendment..... 5, 7

United States Constitution, Fourteenth Amendment .. 5, 7

New York Statutes

Criminal Procedure Law § 1.20(33) 2

Criminal Procedure law § 2.20..... 2

Estates, Powers and Trusts Law § 8-1.4 4

Judiciary Law § 774..... 6

Not-for-Profit Corporation Law § 1008..... 11

Not-for-Profit Corporation Law § 1403..... 2

Penal Law § 400..... 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1649

KENNETH ELLMAN,

Petitioner,

—against—

R.E. DAVIS, Warden, Westchester County Penitentiary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent R.E. Davis, Warden of the Penitentiary of Westchester County, by his attorney, Dennis C. Vacco, Attorney General of the State of New York, respectfully submits this brief in opposition to the petition for certiorari.[1] The United States Court of Appeals for the Second Circuit unanimously reversed the district court's grant of a writ of habeas corpus, holding that petitioner failed to exhaust his state remedies when he withdrew two state court appeals after fil-

[1] Because R.E. Davis was named respondent in the petition in the district court only in his capacity as custodian of petitioner, and this habeas corpus proceeding concerns an action in the state court brought by the Attorney General of the State of New York, by order of the district court the Attorney General was permitted to proceed in place of respondent. Therefore, respondent will be referred to as "Attorney General."

ing a federal writ of habeas corpus and that his attorney's earlier failure to pursue those appeals in a procedurally proper manner did not render petitioner's state remedies so futile that it excused petitioner from satisfying the exhaustion requirement. Because the decision of the court of appeals is consistent with settled principles of exhaustion and does not conflict with decisions of this Court or the other courts of appeals, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. The State Court Action

In November, 1987, the Attorney General commenced an action for corporate dissolution and injunctive and related relief against the Westchester County Society for the Prevention of Cruelty to Children, Inc. ("Westchester SPCC"), its directors and officers, and its incorporator and undisputed leader, petitioner Kenneth Ellman. A 2.[2] Societies for the prevention of cruelty to children are charitable, not-for-profit corporations granted extraordinary powers under New York law, including the authority to appoint peace officers who may carry handguns and make summary arrests. New York Not-for-Profit Corporation Law ("N-PCL") § 1403, (McKinney Vol. 37); New York Criminal Procedure Law ("CPL") §§ 1.20(33), 2.20 (McKinney Vol. 11A); New York Penal Law ("Penal Law") § 400 (McKinney Vol. 39). A 2. The complaint alleged that the organization's activities posed a threat to public safety in Westchester County because the Westchester SPCC, under petitioner's direction, had exceeded its authority and abused its special powers by operating as an unaccountable, private secret police force. Among the abuses detailed in the complaint were that petitioner and the other defendants had stockpiled an arsenal of handguns

[2] Citations in this form are to the appendix annexed to the petition for a writ of certiorari.

far more powerful than those used by most police departments. A 16-17.

A preliminary injunction was entered against petitioner and the other defendants in May, 1988, in which, *inter alia*, petitioner was directed to register six handguns in his possession. A 3. When petitioner failed to register the six handguns specified in the state trial court's preliminary injunction, the Attorney General moved to hold him and the other defendants in civil contempt of that order. A 3. In response to the Attorney General's motion, the petitioner contended, without substantiation, that the handguns were no longer in New York but were in New Jersey. A 80. However, New Jersey firearms registration records that were never submitted in the state trial court action reflected that the seventeen handguns were not registered by petitioner in that state until November, 1990. A 72-75.

After petitioner failed to comply with a further order directing him to turn over to the New York State Police all handguns in his possession for which no license had been obtained, the Attorney General again moved for an adjudication of civil contempt against both petitioner and the corporation. A 3. After rejecting a motion by all of the defendants to vacate this "turn over order" on the grounds that the state court lacked jurisdiction to direct the production of handguns that were allegedly no longer in New York State, the court held a civil contempt hearing, and, in a decision in open court on February 1, 1991, and also embodied in a written order on February 5, 1991, the state court held petitioner in contempt.[3] A 3.

The state trial court afforded petitioner an opportunity to purge his contempt if he surrendered the seventeen weapons to the New York State Police. In the event petitioner failed to

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[3] Prior to the conclusion of the hearing, the contempt charges against the other defendants, the corporation and its directors, were settled by agreement of the parties. A 19.

comply with this directive, the order provided that petitioner would be "imprisoned in the Westchester County Jail for a period not exceeding 90 days or until discharged according to law." A 3. Petitioner did not purge his civil contempt and, in accordance with the terms of the order entered February 5, 1991, the state trial court issued a warrant for his arrest on February 8, 1991. A 3.

In August, 1991, petitioner appealed from the civil contempt order of February 5, 1991. A 3. In an unsuccessful application for a temporary stay of the trial court's contempt order, petitioner alleged that he could no longer comply with the order because he had disposed of the weapons. A 3. The appeal was ultimately dismissed on the ground that petitioner had chosen to remain outside the state of New York rather than comply with the order, and he was, thus, "a fugitive from justice and [was] unavailable to obey the mandate of the court." A 3. Petitioner's motion to appeal that dismissal to the New York Court of Appeals was denied on the ground that the civil contempt order "does not finally determine the action within the meaning of the Constitution." His motion for reargument of that determination was also denied. A 3.

During this period, the Attorney General also sought the dissolution of the Westchester SPCC on the grounds that the corporation had willfully failed to register with the Attorney General and to file financial reports as a New York charitable entity pursuant to New York Estates, Powers and Trusts Law § 8-1.4 (McKinney Vol.17B). A 3. By order entered January 25, 1991, the corporation was directed to register with the Attorney General and to file financial reports. After the Westchester SPCC disregarded this order, partial summary judgment was entered for the Attorney General on August 2, 1991, dissolving the Westchester SPCC. A 3.

Petitioner remained a fugitive until his apprehension on July 24, 1992, by representatives of the New York City Sheriff's office pursuant to the state trial court's arrest warrants.

A 4. On July 27, 1992, he was produced before the state trial court and again offered the opportunity to purge himself of the contempt by turning over the seventeen handguns. Petitioner refused and was committed to the Westchester County Penitentiary pursuant to the civil contempt order. A 4.

B. State Court Challenges To Detention

On September 18, 1992, petitioner sought a writ of habeas corpus from the state trial court. The grounds asserted in the petition were, *inter alia*, that petitioner's detention deprived him of due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution. A 4. The state trial court denied the writ of habeas corpus from the bench on September 24, 1992. A 4. When petitioner's counsel failed to submit a written order for the court's signature in the form required by the court, the state trial court prepared and signed a written order denying the writ on January 14, 1993. A 224. Petitioner appealed from that order by notice of appeal dated February 2, 1993, but withdrew his appeal on April 10, 1993, after filing his federal habeas corpus petition. A 5-6.

On October 5, 1992, petitioner commenced another proceeding, this time seeking a writ of prohibition in the New York Supreme Court, Appellate Division, Second Judicial Department. A 4. In that application, he raised all of the issues that he had presented in his state petition for a writ of habeas corpus, and additionally sought a writ of prohibition against his further detention. The Appellate Division denied the petition and dismissed the proceeding on December 7, 1992, on the grounds that, "the petitioner here has failed to demonstrate a clear legal right to the relief requested which could not otherwise be safeguarded through alternative remedies." A 5. Petitioner's motion for leave to appeal to the New York Court of Appeals from that order was denied on March 25, 1993. A 5.

At the conclusion of the initial ninety-day period of petitioner's detention, the Attorney General moved to extend his civil contempt commitment for an additional ninety-day period on the ground that petitioner continued to refuse to surrender the handguns, although he remained able to do so. A 5. The state trial court granted the Attorney General's motion to extend petitioner's civil contempt for an additional ninety-day period pursuant to the New York civil contempt statute, New York Judiciary Law § 774 (McKinney Vol. 34). A 5. Petitioner's counsel objected to the state trial court's determination being set forth only in a directive contained in the minutes of the proceeding, signed by the court and entered by the clerk (the "so ordered" transcript), but did not subsequently submit a formal order as an alternative. A 4.

On November 18, 1992, petitioner filed a notice of appeal from the "so ordered" transcript ordering petitioner's continued detention, and subsequently perfected the appeal. A 5. However, on March 2, 1993, the Appellate Division, Second Judicial Department, dismissed the appeal *sua sponte* on the grounds that the order appealed from was "merely a decision, which is not appealable." A 5. After learning of the dismissal, the Attorney General submitted a second order, *nunc pro tunc*, which was entered on March 31, 1993. Petitioner did not seek to appeal from that order.

On January 14, 1993, the Attorney General again sought an extension of petitioner's detention for civil contempt, on the same grounds—that petitioner continued to refuse to comply with the state trial court's orders. Petitioner again appeared, represented by counsel, and he once again declined to purge himself of his contempt. A further order was entered extending his incarceration pursuant to Judiciary Law § 774(2). A 5. On February 2, 1993, petitioner filed a notice of appeal from that order extending his detention, but withdrew the appeal on April 10, 1993, after filing his federal writ. A 5-6.

Petitioner withdrew his two pending appeals, (1) from the order entered January 13, 1993 denying the state writ of

habeas corpus and (2) from the order entered January 14, 1993 extending his civil contempt incarceration, before any New York appellate court had addressed the merits of his constitutional claims. A 5-6. The Attorney General opposed this application, on notice to both petitioner and his attorney, on the grounds that the discontinuance of the appeals would represent a deliberate bypass of state appellate remedies that petitioner was required to exhaust as a prerequisite for federal review. Nevertheless petitioner did not withdraw his application and his motion was granted by the Appellate Division in an order dated May 21, 1993. A 6.

C. The Federal Habeas Corpus Proceeding

Just five days before petitioner withdrew both state court appeals, on April 5, 1993, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York. A 131. In the petition, petitioner asserted twenty-four constitutional and federal statutory grounds challenging his detention, including the constitutional claims that he had previously raised in the state appeals that he had withdrawn and which he has again raised in his pending motion in the state trial court to dismiss the state court action.[4] A 63, 149-160.

On May 4, 1993, the Attorney General moved to dismiss the petition on the grounds that petitioner had failed to exhaust his state remedies as required by 28 U.S.C. § 2254(c). A 6. By memorandum and order filed June 8, 1993, the district court converted the motion to dismiss the petition into a

[4] The litigation in the state trial court remains pending today. On June 17, 1993, petitioner moved to dismiss the state trial court action on the grounds, *inter alia*, that the state court was without authority to proceed against him following the dissolution of the Westchester SPCC and that to do so would deprive him of due process in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. A 63. At the request of the Attorney General, the state trial court action has been stayed pending entry by the district court on remand of a final order dismissing the federal habeas corpus petition.

motion for summary judgment, and cross-motion for the same relief, on the grounds that "the procedural issue of exhaustion of remedies is inextricably intertwined with the merits, or lack thereof, of the petition itself." A 6.

On October 12, 1993, the district court granted the petition for a writ of habeas corpus. A 12-34. The court determined that petitioner had exhausted all available state remedies by his attempts to appeal from the denial of the writ of prohibition and from the extension of his incarceration pursuant to the "so ordered" transcript, and, in any event, further pursuit of relief in the state courts would be so ineffective as to be futile. A 26-30. The court based the latter conclusion upon findings that petitioner's state remedies were "virtually inexhaustible" because a new recommitment order was entered against him at ninety-day intervals and that the state had deliberately frustrated his efforts to exhaust by failing to object to the use of the "so ordered" transcript by the state trial court. A 27-28. Notwithstanding petitioner's pending motion before the state trial court, the district court also held that finality had been provided to the state proceedings by petitioner's withdrawal of his two pending appeals. Final judgment was entered on November 29, 1993. A 25-26.

D. The Decision of the Court of Appeals

On appeal, the Court of Appeals for the Second Circuit reversed and remanded to the district court to enter judgment dismissing the petition. 39 F.3d 473 (2d Cir. 1994). A 1-11. The court disagreed that petitioner had fairly presented his federal claims to the state appellate courts for review on the merits by filing procedurally defective challenges to his incarceration. Rather, the court held that it was the responsibility of petitioner's attorney, not the State, to submit orders in acceptable, appealable form to the trial court. A 11. Moreover, the court concluded that, irrespective of those missteps, his deliberate withdrawal of his two state appeals independently barred federal review:

> The [district] court, however, failed to consider that Ellman, after missing several opportunities to perfect a state appeal, voluntarily withdrew his state appeal for no apparent reason. While the missed opportunities alone may have operated to bar Ellman's federal habeas petition, his voluntary withdrawal clearly deprived the state courts of the opportunity to hear his constitutional claims and thus barred federal relief.

A 7-8.

The Second Circuit thus reversed the district court's decision. Petitioner's motion for rehearing and rehearing *en banc* was denied by the court of appeals on February 6, 1995. A 37-38. Petitioner then moved to enlarge the record on appeal to include evidence which he claimed established that his attorney had not once, but twice, attempted to submit an appealable order denying the petition for a State writ of habeas corpus. This motion was also denied by the court of appeals. The district court, however, granted the same motion on January 18, 1995. A 35-36. Having succeeded in enlarging the record to include this "evidence," petitioner again moved in the circuit for hearing *en banc* "to inform the *en banc* court of [the] new record". The motion was denied by order dated February 6, 1995. A 39-40.

REASONS FOR DENYING THE WRIT

In holding that petitioner was not entitled to federal habeas corpus relief because he had failed to exhaust his state remedies, the court of appeals merely applied well-established principles of exhaustion.

Since this Court's decision in *Fay v. Noia*, 372 U.S. 391 (1963), which held that a deliberate bypass of available state appellate remedies precludes federal review, and more recently in *Coleman v. Thompson*, 501 U.S. 722 (1991), which held that a default in pursuing available state appellate reme-

dies also precludes such review absent both cause for the default and actual prejudice resulting from the alleged federal violations, exhaustion of state remedies is an absolute prerequisite to federal habeas corpus relief. Here, petitioner had two appealable orders entered on January 13, and 14, 1993, respectively, from which he filed notices of appeal. However, he withdrew them just five days after filing the petition for federal habeas relief. By that deliberate act, petitioner was expressing an impermissible preference for the federal forum. *Engle v. Isaac*, 456 U.S. 107, 130 (1982).

This Court has also long held that it is not sufficient merely that a habeas petitioner has been through the state courts; his claims must be fairly presented so that the state has the opportunity to correct any alleged constitutional violations. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). Compliance with those procedures will only be excused where the state process is "so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). Thus, the court of appeals' decision that petitioner's unsuccessful attempts to obtain state court review were due to his failure to comply with legitimate procedural requirements of the state courts and precluded federal court review was consistent with well-established law.

Petitioner argues, however, that Supreme Court review is appropriate in this case because an alleged complicity by the State in delaying his appeals from the order denying state habeas relief and from the order extending his contempt incarceration should have been found to excuse his failure to exhaust state appellate review. With respect to review of the state court's denial of his habeas petition, petitioner argues that although his attorney proffered proposed orders to the state trial court on two occasions which were defective, the court should have promptly entered an appealable order.[5] With

[5] The defect in the second proposed order submitted by the petitioner's attorneys, which was apparently not served upon and was thus unknown to the Attorney General until petitioner's post-appellate motion

respect to review of the orders extending petitioner's incarceration, petitioner argues that he should be deemed to have exhausted his appellate remedies because he perfected an appeal from a directive that his own attorney had declared, and the state courts ultimately concluded, was not appealable. In each instance, petitioner urges this Court to accept a different view of the facts than that adopted by the court of appeals regarding the manner in which his attorneys' discharged their duties. Alternatively, petitioner posits the creation of a new qualification or exception to the exhaustion doctrine—that where the state fails to review the work of and correct any procedural errors committed by a habeas petitioner's attorneys, it forfeits the right to assert the defense of exhaustion. There is no support for such a proposition, either in the decisions of this Court or in decisions of other courts of appeals.

Notwithstanding his deliberate bypass of state appellate review, petitioner alternatively argues that the Court should grant this petition because, he claims "actual innocence" and that it would be a "fundamental miscarriage of justice" were he now to be compelled to exhaust state appellate remedies. Relying upon an exception to the exhaustion doctrine articulated in *Murray v. Carrier*, 477 U.S. 478, 495 (1986), petitioner claims that since the state court lacks jurisdiction to compel production of the handguns at issue following the dissolution of the corporation, he should not be required to exhaust his federal claims in the still-pending state court action.[6]

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to enlarge the record, is obvious on its face. While the body of the proposed order is substantially identical to the version ultimately entered by the state court, the proposed order that is reproduced in petitioner's appendix was incorrectly entitled "Petition for Writ of Habeas Corpus" rather than "Order and Judgment on Petition for Writ of Habeas Corpus."

[6] Petitioner is wrong. The state trial court retains jurisdiction over petitioner and the handguns pursuant to its powers under New York law to adjudicate the disposition of what may be property of a dissolved not-for-profit corporation. New York N-PCL § 1008 (McKinney Vol. 37).

This argument distorts the intent of this narrow exception created as a last refuge from punishment for innocent detainees who have no recourse other than a federal writ. The exception has no application where a prisoner still has state appellate remedies available to him that he has not exhausted. The Court's recent analysis of this narrow exception focuses on the availability of a new trial and the possibility of executive clemency to address a claim of actual innocence asserted by a convicted defendant facing execution and is founded upon the presumption that to seek its invocation a petitioner must no longer have meaningful state remedies to which he may resort. *Herrera v. Collins*, ___ U.S. ___, 113 S. Ct. 853, 122 L.E. 2d 203 (1993). In this case, by contrast, proceedings in the state trial court from which petitioner may appeal his federal claims are currently pending, and he has in fact submitted a motion raising those very claims. The question of his "actual innocence" should first be reviewed by New York's appellate courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
May 10, 1995

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